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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

*Gilliespie*

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

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VOL. XLVIII.

CONTAINING

*The Cases in the Court of Queen's Bench, in Trinity Vacation, Michaelmas Term and Vacation,  
Hilary Term and Vacation, and Easter Term and Vacation,  
6 & 7 Victoria.*

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# QUEEN'S BENCH REPORTS.

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BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, ESQ.,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, ESQ.,

BARRISTERS AT LAW.

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NEW SERIES.

VOL. V.

CONTAINING THE CASES DETERMINED IN TRINITY VACATION,  
MICHAELMAS TERM AND VACATION, HILARY TERM  
AND VACATION, AND EASTER TERM AND  
VACATION, 6 & 7 VICTORIA.

WITH

TABLES OF THE NAMES OF CASES ARGUED, AND  
THE PRINCIPAL MATTERS.

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PHILADELPHIA:

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1872.



**JUDGES**  
**OF**  
**THE COURT OF QUEEN'S BENCH,**  
**DURING THE PERIOD OF THESE REPORTS.**

---

**The Right Hon. THOMAS LORD DENMAN, C. J.**  
**Sir JOHN PATTESON, Knt.**  
**Sir JOHN WILLIAMS, Knt.**  
**Sir JOHN TAYLOR COLERIDGE, Knt.**  
**Sir WILLIAM WIGHTMAN, Knt.**

---

**ATTORNEYS-GENERAL.**

**Sir FREDERICK POLLOCK, Knt.**  
**Sir WILLIAM WEBB FOLLETT, Knt.**

---

**SOLICITORS-GENERAL.**

**Sir WILLIAM WEBB FOLLETT, Knt.**  
**Sir FREDERICK THESIGER, Knt.**



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**CASES**  
**ARGUED AND DETERMINED**  
**IN**  
**THE QUEEN'S BENCH,**

**Trinity Vacation,**

**VL & VII VICTORIA.**

The judges who usually sat in banc in this vacation were,

LORD DENMAN, C. J.

WILLIAMS, J.

PATTESON, J.

COLERIDGE, J.(a)

**The QUEEN v. The Justices of the West Riding of YORKSHIRE.**

**(SHEFFIELD v. CRICH.)**

On notice of an order removing paupers from S. to C., the overseers of C. gave notice of appeal, which they afterwards countermanded, reserving the right to appeal when the paupers should be actually removed. At the following sessions the overseers of S., according to the alleged practice of the sessions, entered an appeal against the order, as by the overseers of C., but without their knowledge or consent; and thereupon the order was confirmed with costs. More than six months after the confirmation, the pauper was removed to C.; whereupon the overseers of C. applied at the next sessions to erase the entry of the previous appeal and order, and to enter their appeal against the order of removal. The sessions refused.

*Held*, that although the sessions ought to have entered and heard the second appeal, they could not erase the previous entry without the authority of this court. And that, the entry of the first appeal and order thereon being irregular and without jurisdiction, and likely to prejudice C. on a future appeal, a mandamus was rightly issued on the prosecution of the overseers of C. to erase it from the records.

The court, in its discretion, refused to order the respondents to pay the costs of the mandamus, and of a peremptory mandamus after argument on the return, though it appeared that the return had been supported on their behalf and not that of the justices; inasmuch as the entry was made by the error of the justices, and in conformity with a practice which had long prevailed at the sessions.

*Seemle*, that the court, under stat. 1 W. 4, c. 21, had power to order the respondents to pay the costs, including those of both writs, though it was not expressed on the return, according to sect. 4, that such return was made on behalf of the respondents.

**MANDAMUS.** The writ recited that, by order of two justices of the West Riding, 14th September, 1841, Mary Younge and her children had been \*removed from the township of Sheffield to that of Crich in the county of Derby: that, on the 18th of the same month, a counter- [•2

(a) The court sat in banc on the 16th, 17th, 23d, 24th, 26th, 27th and 29th of June.

part of the order, notice of chargeability and copy of examinations had been sent to the overseers of Crich: that afterwards, and before the next quarter sessions for the West Riding, the overseers of Crich gave notice of appeal and the grounds thereof, and subsequently, and before the holding of the said sessions, duly countermanded the same, the grounds being insufficiently stated, reserving to themselves the right of appealing against the order after the paupers should have been actually removed. That, at the next quarter sessions for the West Riding, held on 25th October, 1841, notwithstanding this countermand and without the knowledge or consent of the overseers of Crich, an appeal was entered by the overseers of Sheffield against the said order; and the justices at such sessions confirmed the order without hearing the merits, and without the privity, knowledge or consent of the overseers of Crich. That at the time of holding the said sessions the paupers had not been removed under the order; nor were they actually removed until after the Easter sessions, 1842. That no notice had been given to the overseers of Crich of the said order of sessions until long after the said Easter quarter sessions; and that, on 10th May, 1842, the paupers were actually removed to Crich, and notice of the order of quarter sessions confirming the order of removal was then first given to the overseers of Crich. That at the Midsummer quarter sessions, June 28th, 1842, application was made to the sessions by the overseers of Crich to erase from the records of the sessions the previous entry of the appeal and confirmation, and to enter and respite an appeal of the overseers of Crich against the order of removal; but that the sessions had refused to do either, and had not erased the entry, nor entered the appeal.

The writ then commanded the justices to erase from the records of the sessions the entry of an appeal of the overseers of Crich on 25th October, 1841, and the order made thereupon whereby the order of removal was confirmed, and to enter, as of Midsummer sessions, 1842, an appeal against the said order of removal, to enter continuances thereupon, and to hear it at the next sessions; or that they should show cause to the contrary.

The return (which was by the justices, and did not purport to be on behalf of the overseers of Sheffield) stated that the overseers of Crich, on 18th October, 1841, gave a written notice to the overseers of Sheffield that, in the event of the removal of the paupers, they intended to enter an appeal against the removal and order of justices at the sessions next after the removal. That no such appeal was in fact entered at the last mentioned sessions; but that at those sessions, namely on 25th October, 1841, according to the practice of the court, upon the application of the overseers of Sheffield, the court ordered an appeal to be entered against the order of removal, and further that the order should be confirmed, and the same was confirmed accordingly; and they did further order the costs of attending the sessions to be paid by the overseers of Crich. The return then stated that the actual removal took place May 10th, 1842, and that

at the then next Midsummer sessions, holden by adjournment in and for the West Riding, on July 4th, 1842, being the proper sessions for entering and hearing appeals wherein the \*churchwardens, &c. of Sheffield were respondents, the officers of Crich applied to the sessions to [\*4 enter an appeal against the order of removal, and to erase from their records the entry of the proceedings at the previous October sessions at Sheffield; but that the court refused the application; by reason whereof the order of confirmation made at the October sessions remained unrepealed and in full force. And the justices submitted that they had no power to erase the entry of appeal and confirmation, or to alter their records; and that, inasmuch as the order of removal had been confirmed, they had not entered another appeal and continuances as commanded by the writ. The case was now argued on a concilium.

*Whitehurst*, for the crown, was stopped by the court who called upon *Pashley*, contra. If the proceeding of the justices at sessions was without authority or jurisdiction, it is a mere nullity. The entry on the records of the court under such circumstances cannot affect the prosecutors; and this court will not award a writ that can serve no useful purpose. If, indeed, the mandamus had been only to enter an appeal, there would have been some ground for it: but the writ, as it asks too much, cannot now be moulded by the court as might have been done upon the rule to show cause why the writ should not issue; *Rex v. The Church Trustees of St. Pancras*, 3 A. & E. 585. The main question therefore is, whether this court can compel the erasure of a record of the sessions. No authority warrants such an interference. The \*court will command the justices to hear an appeal, or to do any act which was a duty clearly [\*5 incumbent upon them without any such command, but not to do an act which could not lawfully have been done at sessions. The application is only quia timet, lest the appellants in a future appeal should happen not to be able to prove the circumstances which make the order of sessions inoperative; whereas the mere production of the order without proof of the proceedings on which it was grounded would be no evidence. The sessions had no power over their own records when perfected; Lambard's *Eirenarcha*, B. 1, c. 13, p. 64, (ed. 1619;) and this court cannot give it to them. [Lord DENMAN, C. J. According to your argument we cannot even order the justices to enter continuances, for this is an alteration of their records. PATTESON, J. The court had no right to enter an appeal on the mere application of the respondents. It is an impertinent entry.] The officers of Sheffield had a right to enter an appeal for the purpose of getting the costs occasioned by the notice of appeal, pursuant to 8 & 9 W. 3, c. 30, s. 3. No mandamus lies to compel a special entry at sessions; *Rex v. The Justices of Devon*, 1 Chit. Rep. 34. [Lord DENMAN, C. J. The wonder is that a rule nisi was granted in that case.] This court will not compel an erasure even in a baptismal register; *Ex parte Stanford*, 1 Q. B. 886; nor direct the sessions to alter the minutes of a

verdict which has not been regularly recorded ; *Rex v. Hewes*, 3 A & E. 725. In *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1113, the mandamus was only to make up a record according to the facts, \*and  
 \*6] not to alter one. *Rex v. Carlile*, 2 B. & Ad. 971, shows the reluctance of the court to meddle with records. They are of such "incontrollable credit and verity" as to admit of "no plea, averment, or proof to the contrary," Co. Lit. 260 a: and it is a great misprision to rase or vitiate them ; 3 Inst. 71. The present application is an attempt to make this a court of appeal without a special case. But the court will not assume such general powers of correction, or look out of the order itself to find grounds for annulling it.

*Whitehurst*, in reply. The question before the court is, whether it has power to make the order, not whether it is necessary to do so. [COLERIDGE, J. We need not grant a peremptory writ, if any writ at all is needless.] The quarter sessions have done an act in furtherance of a fraud committed by the Sheffield overseers. All that the overseers of Sheffield could do was to apply for costs, not enter a fictitious appeal by Crich in order to get them. In yielding to the application the justices overstepped their jurisdiction, and have put upon record an unwarrantable judgment, which at a future time will embarrass the parish of Crich. [COLERIDGE, J. The practice has sometimes been to file the order of justices when there is no appeal ; and this has been called confirming it.] The practice alleged here goes far beyond that. (*Whitehurst* was then stopped by the court.)

LORD DENMAN, C. J. This is a peculiar case. It may perhaps be the first time we have been called upon to erase an entry on the records of the sessions ; but it is not new in principle. The mandamus to enter continuances is, in some respects, a stronger interference of \*this court.  
 \*7] It is necessary for the purposes of justice that we should interfere ; for the sessions could not erase the entry without the authority of a mandamus. At first it appeared to us that the entry was innocuous. But it is an important question whether the justices shall be empowered to give effect to a fraud by such a practice as they have established. It may have been adopted, with a view to costs, under stat. 8 & 9 W. 3, c. 30, s. 3, without material prejudice, because the parish receiving the pauper, having let pass their opportunity of appealing against the order of removal, could not have prosecuted any further appeal. But now, under stat. 4 & 5 W. 4, c. 76, they may, after countermanding their notice of appeal against the order, appeal against the removal ; and in such a case the proceeding now complained of would be clearly injurious. We think the practice wrong ; and we must correct it. The entry may, possibly, altogether defeat justice ; for, when the question of the validity of the order shall hereafter arise on an appeal, the justices may refuse a case. When the erasure now called for has been made, they will discuss the order of removal on its merits. The respondents, instead of confining themselves to the remedies given by act of parliament, have procured the entry of the false fact of a

appeal, and of a judgment on such appeal; and then they delay any further step until the time for obtaining a certiorari has lapsed.

PATTESON, J. I had doubts as to the power of this court: but the case is analogous to that of directing the entry of continuances after many intervening sessions, when it is clear that the justices themselves could not do so without a mandamus. The books do not show \*more authority [18] to make, than to erase, entries. We shall not here require them to alter their judgment, but only to expunge a false statement of an appeal. Before stat. 8 & 9 W. 3, c. 30, no costs could be obtained without an appeal entered: but, if the practice of these sessions were to be established, the provisions of that act (sect. 3) would be superfluous. The act enabled the removing parish to get an order for costs without adjudication on the settlement or the order of removal: and before stat. 4 & 5 W. 4, c. 76, it was immaterial to the appellants whether the costs were obtained by a special order, or by the entry of an appeal behind their backs. This perhaps may have given rise to the practice said to prevail at these sessions. The parish of Crich might no doubt have entered an appeal without noticing what had been done at the previous sessions, and without erasing the entry then made: but, if we were to confine the mandamus to the entry of another appeal, the old order would be set up at the trial, and an argument would arise on its effect.

WILLIAMS, J. Mr. *Whitehurst's* answer is complete. The respondents were entitled to nothing but costs; and the court had no jurisdiction over the question of settlement upon an appeal so entered. The appellants, in countermanding their notice, reserved the right of appeal. The order was most irregularly and improperly confirmed; and, in furtherance of justice, we must direct the proceedings to be erased.

COLERIDGE, J. The justices have acted without jurisdiction. Putting a reasonable construction on the allegations of the writ, we find that the order of sessions was procured by the overseers of Sheffield upon the \*entry of an appeal by themselves. The statutes give no such appeal [19] to the removing parish. They have no need of it; for they can abandon their order, or get it quashed by this court. If the order is not objected to, they may get it enrolled at sessions for custody and better proof. The practice set up here is irregular and unjust, and is converted to a fraudulent purpose. The removing parish officers get an order confirmed in the absence of the parties interested and with a knowledge of their intention to appeal against it; and then they defer the removal until the order of sessions is no longer examinable by the ordinary means. If there were no other instance of a mandamus in such a case, I think there is a jurisdiction inherent in this court to make the precedent.

Judgment for the crown.(a)

(a) Reported by Edward Smirke, Esq., by whom the following case is also furnished  
The QUEEN v. The Justices of CORNWALL.

(Bail Court. Mich. T. 1843.)

An order of removal from the parish of Germoe to that of Breage was made in Nov.

\*10] \*A peremptory mandamus issued; and the sessions (October, 1843) erased the entry, heard the appeal, and discharged the order of removal. In Michaelmas term, 1843, *Whitehurst* obtained a rule calling on the churchwardens and overseers of Sheffield to show cause why they should not pay to the churchwardens and overseers of Crich the costs occasioned by the applications for the two writs of mandamus, the costs of and incidental to the writs, and the costs of this application.

The rule was obtained on affidavit that, at the Rotherdam July sessions, 1842, before the rule nisi for a mandamus was obtained, the parish officers of Crich applied to have the entry erased, and the appeal entered and respited; but that the sessions refused the application. That after the writ was served on the magistrates, namely, at the West Riding spring sessions, 1843, the counsel for the township of Sheffield undertook, on behalf of the parish officers, to indemnify the magistrates from costs if they would make a return; and it was then agreed that he should draw such return. That, on the argument upon the return, it was supported on behalf of the township of Sheffield, and not of the justices.

\*11] \*In answer, it was deposed that the application at the Rotherham July sessions, 1842, was only to erase, and not to enter and respite. That the return made differed from that prepared by counsel for the township of Sheffield, in omitting an allegation, made in the latter, that, the actual removal having taken place on 10th May, 1842, the next West Riding sessions were held on 28th June, 1842, at which there had been no application to enter the appeal; and it was deposed that such allegation was true, and that the omission was made (as deponent believed) by inadvertence; and that counsel had been instructed to support the

1843. Two copies were served on the overseers of Breage, one of which, by an accidental omission in the date, appeared to be the copy of an order of 1840. The defective copy was not accompanied with any notice of chargeability. The overseers of Breage entered two appeals as against two orders. The appeal against the supposed order of 1840 being first called on at sessions, the respondents proved that there was only one order in fact, which they were ready to support, and that it bore date 1843, as the appellants knew. The sessions thereupon adjudged that the supposed order of 1840 be quashed with costs. The appeal against the real order of 1843 was then called on: but the sessions, at the suggestion of the appellants, refused to hear the respondents, on the ground that, as it had been admitted that there was only one order in fact, the judgment just given must be taken to have quashed that order, and therefore that they could not try a second appeal against it; and thereupon an order was made to quash the order of 1843 also, with costs.

*Smirke* moved, on behalf of the respondents, for a mandamus to erase the entry of the appeal against an order of 1840, and the judgment thereon, and to enter continuances and to hear the appeal against the order of 1843; and he relied on *Regina v The Justices of West Riding*, above reported.

PATTERSON, J. That was a very peculiar case, and we must not extend it; otherwise we shall be continually called upon to erase the records of the quarter sessions. The entry under the circumstances stated is perfectly harmless. It cannot be used against the respondents when explained by proper evidence.

Rule nisi to enter continuances, and hear the appeal against the order of 1843.

The rule was made absolute by the full court, in Trinity vacation, (June 26th,) 1844. See also *Ex parte the Overseers of Ackworth*, 3 Q. B. 397.

return on behalf of the township of Sheffield, in the belief that the facts would be truly stated in the return.

In Hilary term, 1844, (a)

*Pashley* showed cause. First, if the court has the power to grant this application, it is not a case in which they will so use their discretion. It is true that the general rule is to give costs; *Regina v. The Mayor &c. of Newbury*, 1 Q. B. 751, 765: but an exception is made in cases of great doubt, as in *Rex v. The Commissioners of the Thames and Isis Navigation*, 5 A. & E. 804, 817. No application was made to the justices to enter and respite the appeal: and, as to the erasure, they could not make it except in obedience to a mandamus, as was said by the members of this court when the return was argued: ante, pp. 6, 7. The want of power over the record, on the part of the justices, appears from Lamb. Eiren. B. 1, c. 13, p. 64; Co. Lit. 260 a; *Rex v. Carlile*, 2 B. & Ad. 971, 973. And the respondents have nothing to do with the proceedings of the justices \*un- [\*12  
der the mandamus. But, secondly, the court has no power to give the costs. The writs were not "issued and obeyed," within the meaning of stat. 1 W. 4, c. 21, s. 6. That section applies only where the first writ is, according to the language of this court in *Regina v. Fall*, 1 Q. B. 636, 652, "at once obeyed," not where, as the case is here, a return is made and a peremptory writ awarded. But, further, the parish officers of Sheffield are no parties to the record. The prosecutors are the parish officers of Crich; the defendants are the justices. The application should have been against the justices. The only case in which a party, being neither prosecutor nor defendant, is to be liable for the costs of the writ, return and subsequent proceedings is provided for by sect. 4, which enacts that the return and issues, in fact or law, or on demurrer, may, if the court thinks fit, "be expressed to be made and joined on the behalf of such other person" (than the nominal parties) "as may be mentioned in such rules," that is, the rules to show cause against the issuing of the writs; and such person then conducts the proceedings at his own expense. That has not been done here.

*Whitehurst*, contra. The parish officers of Sheffield were the parties really interested; and the whole expense had its origin in their proceedings before the magistrates. They have compelled the overseers of Crich to obtain these writs, have made and defended the return, and must, according to the ordinary rule, pay the costs, if the court has the power to award them. And such power clearly exists. Sect. 6 of stat. 1 W. 4, c. 21, has the words "the costs of the writ, if the same shall be issued and obeyed." The writs are \*not the less obeyed because a [\*13  
peremptory writ has been rendered necessary by the defendant's making a return: if that were so, the costs might almost always be evaded by making a return. The language of the Court of Exchequer Chamber

(a) January 21st. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

**18 REG. v. Inhabitants of St. PANCRAS. T. V. 1843.**

in *Regina v. Fall*, 1 Q. B. 653, 659, is perfectly general. In *Regina v. St. Saviour's, Southwark*, 7 A. & E. 925, the parties really interested were made to pay the costs of the writs, though there had been a return and a peremptory mandamus. (a) *Cur. adv. vult.*

Lord DENMAN, C. J., in Hilary vacation, 1844, delivered the judgment of the court.

The words of stat. 1 W. 4, c. 21, are large, and may be sufficient to enable the court to grant this application. But, as the entry was made through the error of the justices, or rather of the clerk of the peace, in conformity with a practice which, however improper, had long prevailed, we think that in our discretion we ought not to make this rule absolute.

Rule discharged, without costs.

(a) The above arguments are ex relatione *Pashley*.

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**The QUEEN v. The Inhabitants of St. PANCRAS.**

Pauper, being hired as a yearly servant on 30th November, 1828, continued to serve under the hiring till 1837. On 30th November, 1833, and for forty previous days, she resided in the parish of St. Pancras. In March, 1834, and thence till 1837, she resided in St. Marylebone. *Held*, that, by the operation of stat. 4 & 5 W. 4, c. 76, s. 65, she was settled in St. Pancras and not in St. Marylebone.

On appeal against an order of two justices for the removal of Jane Roberts from the parish of St. Marylebone, in the county of Middlesex, to the parish of \*St. Pancras, in the same county, as the place of her  
\*14] last legal settlement, the sessions confirmed the order, subject to the opinion of this court on the following case.

The pauper was hired on the 30th November, 1828, as a yearly servant, by Mrs. Hewitson, and served her said mistress under that hiring in various places continuously until 1837. On 30th November, 1833, and for forty previous days she lived with her mistress in St. Pancras. In March, 1834, she went to reside with her said mistress in St. Marylebone, where she continued to reside until the conclusion of her service. The appellants contended that on 13th August, 1834, a year's service under a yearly hiring was complete, and that the last forty days' residence in St. Marylebone previous to August 14th, (a) 1834, fixed the settlement in the respondent parish. But the respondents contended that, the original hiring of the pauper having taken place on 30th November, the last settlement of the pauper was gained by the last forty days' residence ending on 30th November, 1833, the end of the last even year reckoning the year's services from the commencement, no subsequent even year's service being capable of completion, by operation of stat. 4 & 5 W. 4, c. 76, s. 65.

The question for the opinion of the court was, whether the pauper's

(a) When stat. 4 & 5 W. 4, c. 76, received the royal assent.

year's service, ending August 13th, 1834, was, under the circumstances of the case, disseverable on the 30th November, 1833, so as to prevent a settlement being gained by the last forty days' residence previous to August 14th, 1834. If it was so, the order of sessions and order of removal were to be confirmed; otherwise the orders to be quashed.

*Merivale*, in support of the order, cited *Rex v. Rettendon*, 6 A. & E. 296; *Rex v. St. John the Evangelist*, 6 A. & E. 300, and *Rex v. Crocombe*, Bur. S. C. 256, contending that the first two cases ruled the present, and that the forty days' residence in St. Pancras in 1833, under the yearly hiring completed in November of that year, settled the pauper in that parish. [\*15]

*Erle*, contra, contended that service for forty days, under the yearly contract subsisting on 13th August, 1834, completed a settlement, and the act was not intended to divest it; that the contract as stated was one yearly continuing contract until determined by warning, just as much as if the pauper had been originally hired for seven years in 1828, or as if a tenant from year to year had remained in possession for seven years.

LORD DENMAN, C. J. No doubt the statute was meant to apply to a case like the present. The fractional part of the yearly service in 1834 is not to be taken into account.

PATTESON, J. Either the contract of hiring is a new one recommencing every year; or else it is, according to Mr. *Erle's* argument, one entire contract till determined. In either case the contract subsisting in 1834 was not completed within the meaning of stat. 4 & 5 W. 4, c. 76, s. 65.

WILLIAMS and COLERIDGE, Js., concurred.

Order confirmed.(a)

(a) Reported by Edward Smirke, Esq.

### \*The QUEEN v. FEARGUS O'CONNOR and Others. [\*16]

In an indictment for misdemeanor, a count containing no statement of venue, either by reference or otherwise, is bad at common law, after verdict, though a venue be stated as usual in the margin of the indictment.

And such defect is not aided by stat. 7 G. 4, c. 64, s. 20, because it does not appear by the indictment that the court had jurisdiction over the offence.

For the word "jurisdiction" there means local jurisdiction, and not jurisdiction with reference to the nature of the charge.

And the statement of venue in the margin implies only that the indictment is found by a grand jury of the county named, not (as in civil cases) that the complaint is laid as arising within the county.

*Seemle*, that a count in such indictment, charging, without any statement of venue, that certain persons unlawfully and tumultuously assembled, and committed certain other alleged offences, and then adding, with a statement of venue, that the defendants "did unlawfully aid, abet, assist, comfort, support and encourage" the said persons to continue such unlawful assemblings and other offences, is bad at common law, after verdict, because a material fact (the misdemeanor alleged to have been committed by the first mentioned persons) is laid without a proper assignment of venue.

But stat. 7 G. 4, c. 64, s. 20, cures this defect, because it consists only in the "want of a proper or perfect venue," and the court appears by the indictment to have had jurisdiction.

INDICTMENT for conspiracy. Marginal venue, "County palatine of Lancaster."

The first count charged the defendants with unlawfully conspiring, &c., "at the parish of Manchester, in the county of Lancaster."

Fourth count. "And the jurors," &c. "that heretofore, on the 1st day of August in the year aforesaid, and on divers other days and times between that day and the 1st day of October in the year aforesaid, and at divers places, divers evil disposed persons unlawfully and tumultuously assembled together and, by violence, threats and intimidations to divers other persons being then peaceable subjects of this realm, forced the said last mentioned subjects to leave their occupations and employments, and thereby impeded and stopped the labour employed in the lawful and peaceable carrying on by divers large numbers of the subjects of this realm of certain trades, manufactures and businesses, and thereby caused great confusion, terror and alarm in the minds of the peaceable subjects of this realm: and that \*afterwards, on the 1st day of August in the year  
\*17] aforesaid, and on divers other days and times between that day and the 1st day of October in the year aforesaid, at the parish aforesaid, in the county aforesaid, the said Feargus O'Connor," &c., (naming the other defendants,) "together with divers other evil disposed persons to the jurors aforesaid as yet unknown, did unlawfully aid, abet, assist, comfort, support and encourage the said evil disposed persons in this count first mentioned to continue and persist in the said unlawful assemblings, threats, intimidations and violence, and in the said impeding and stopping of the labour employed in the said trades, manufactures and businesses, with intent thereby to cause terror and alarm in the minds of the peaceable subjects of this realm, and, by means of such terror and alarm, violently and unlawfully to cause and procure certain great changes to be made in the constitution of this realm as by law established: against the peace of our said lady the queen, her crown and dignity."(a)

Fifth count. "And the jurors," &c., "that Feargus O'Connor," &c., "together with divers other evil disposed persons to the jurors aforesaid as yet unknown, afterwards, to wit on the 1st day of August in the year aforesaid, and on divers other days between that day and the 1st day of October in the year aforesaid, together with divers other evil disposed persons to the jurors as yet unknown, unlawfully did endeavour to excite her majesty's liege subjects to disaffection and hatred of her laws, and unlawfully did endeavour to persuade and encourage the said liege subjects  
\*18] to unite, confederate and agree to leave their several and \*respective employments, and to produce a cessation of labour throughout a large portion of this realm, with intent and in order by so doing to bring

(a) See *O'Connell v. The Queen*, 11 Clark & Fin. 155.

about and produce a change in the laws and constitution of this realm: against the peace of our said lady the queen, her crown and dignity.”

The indictment was removed into this court by certiorari. On the trial, before ROLFE, B., at the Lancaster Spring assizes, 1843, some of the defendants (Robert Brooke and others) were convicted on the fourth and fifth counts, and some (O'Connor and others) on the fifth only. There was no conviction on any other count.

In last Easter term motions were made, on behalf of several of the defendants, in arrest of judgment, on the grounds, as to the fourth count, that the averments in the early part, which, if any offence appeared, were necessary to make up that offence, had no venue assigned to them; and that the fifth count was entirely without venue.<sup>(a)</sup> The court granted rules to show cause why judgment should not be arrested.

In Trinity term,<sup>(b)</sup>

Sir *F. Pollock*, attorney-general, Sir *W. W. Follett*, solicitor-general, *Wortley*, Sir *G. A. Lewin*, *Waddington*, *R. C. Hildyard*, and *W. F. Pollock* showed cause. First, as to the fourth count. The inducement states that divers evil disposed persons unlawfully and tumultuously assembled together, and by violence and threats \*forced other persons, being subjects of this realm, to leave their employments, and thereby impeded and stopped the labour employed in the carrying on by subjects of this realm of certain trades and manufactures, and thereby caused confusion, terror, &c. in the minds of the peaceable subjects of this realm. The count then goes on to charge that the defendants, in the parish and county aforesaid, did aid, abet, assist and encourage, &c. the said evil disposed persons to continue the said unlawful assemblings, threats, &c., and the said impeding, &c., with intent thereby to cause terror in the peaceable subjects, &c., and, by means of such terror, violently and unlawfully to cause changes in the constitution. The inducement did not require a venue even at common law, and, at any rate, is not prejudiced by the want of one since stat. 7 G. 4, c. 64, s. 20. The court will not assume that the facts described in the inducement took place out of the realm; nor indeed are the averments consistent with that supposition: and, if the facts did occur out of England, the allegations in the latter part of the count still show an indictable offence. If the defendants in England abetted or encouraged the commission of unlawful acts in France or Ireland with the intent here stated, that is an offence against our law. A misdemeanor may be made up of acts committed in several counties, and the venue may be laid in any. In *Rex v. Burdett*, 4 B. & Ald. 95, 138, HOLROYD, J., says: “I think the jury may inquire into, and take cognisance of those facts which are done out of their county, for the pur-

<sup>(a)</sup> Other objections were taken to the two counts respectively, but were not discussed in the judgment of the court now reported, and therefore are not noticed here.

<sup>(b)</sup> May 26th, 1843. Before Lord Denman, C. J., Patteson, Williams and Coleridge, Js. The argument was continued, on June 3d, before the same judges.

pose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those \*cases, where so much of the misdemeanor

\*20] charged as is proved to have been done within their county, is of itself a misdemeanor." "And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the statute of Philip and Mary, but those are, I think, distinguished from, and do not apply to the present question." The distinction between felony and misdemeanor is fully considered by ABBOTT, C. J., in the same case, 4 B. & Ald. 171, et seq., and is commented upon in 1 Stark. Crim. Pl. 26, (2d ed.) Supposing, however, that the omission of a venue to the facts laid in the inducement be a fault, it is only the "want of a proper or perfect venue," which is cured after verdict by stat. 7 G. 4, c. 64, s. 20, "where the court shall appear by the indictment or information to have had jurisdiction over the offence." Now a complete offence is alleged here, as committed by the defendants in the parish of Manchester, namely, that they did, with a certain evil intent, unlawfully "aid, abet, assist, comfort, support and encourage" other persons who had been committing misdemeanors "to continue and persist" in so doing. To aid, abet, and en-

\*21] courage are substantive offences; and, where they are \*charged, they, and not the commission of the act aided in or encouraged, are the material fact, to which the venue is principally important. The effect of the words "aid, abet, encourage," and the like, is shown in 2 Inst. 182; Jacob's Law Dictionary, tit. "*Abet*;" *M'Daniel's Case*, Foster's Cr. L. 121. In cases of solicitation, the endeavour to induce commission of a crime is the substance of the charge; it is not necessary, to complete the misdemeanor, that the solicitation should have been acted upon: *Rex v. Fuller*, 1 Bos. & P. 180; *Rex v. Higgins*, 2 East, 5; *Rex v. Lady Lawly*, Fitzgib. 122, 263;(a) and other cases, cited in 1 Stark. Crim. Pl. 145—148. It may be, in the present case, that the illegal acts abetted and encouraged in Lancashire were done in another county; but, if persons in Cheshire were committing a riot, it could not be said that persons standing close by, but within the borders of Lancashire, and encouraging the rioters by words and shouts, were not indictable in Lancashire. The offence would be complete there, as to act and intent: and whether the rioters proceeded to commit further misdemeanors on the encouragement given, or not, would make no difference.

(a) Where, however, this point is not noticed.

It must be admitted that the objection to the fifth count on the want of venue must prevail, unless cured by stat. 7 Geo. 4, c. 64, s. 20. But the words "County palatine of Lancaster" in the margin of the indictment do imperfectly supply a venue; the objection, therefore, is only want of a "perfect venue;" and that is cured by the statute, which, being remedial and to prevent failure of justice, must be construed liberally. Stat. 16 & 17 Car. 2, c. 8, s. 1 (which appears to have been contemplated in framing the clause now in question) enacts that judgment shall not be stayed or reversed after verdict, "for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid;" and in *Skinner v. Gunton*, 1 Saund. 228, "the court said that, if there were no venue, yet, after verdict, it is aided by the new statute of 16 & 17 Car. 2, c. 8, the cause being tried in the proper county where the action was laid." The same effect was given to this statute in *Tyson v. Paske*, *Ld. Ray.* 1212. The marginal venue may be looked at to "help" a venue imperfectly stated in the body of a declaration (and there is no reason that it should be otherwise with an indictment,) but not to "hurt," where a good venue appears in the body of the count; *Mellor v. Barber*, 3 T. R. 387. In *Duncan v. Passenger*, 8 Bing. 355, a venue appeared in the margin, but none was indicated in the body of the declaration, except by the words "then and there;" and this was held, on special demurrer, to be a sufficient allegation of place, the word "there" applying to the county named in the margin. A county is a sufficient venue since stat. 6 Geo. 4, c. 50, s. 13 has directed that the jury "for the trial of any issue whatsoever, whether civil or criminal," shall be returned from the body of the county. The same doctrine has prevailed as to the venue in civil cases, since stat. 4 Ann. c. 16, s. 6; *Ware v. Boydell*, 3 M. & S. 148. That the marginal venue, if correct, may aid the statement in the count, even in criminal cases, appears from an *Anonymous Case*, in *Keilwey*, 33 b, pl. 6; *Leach's Case*, *Cro. Jac.* 167, and *Rex v. Butler*, 2 Keb. 303. \*Here then is an imperfect statement of venue in the indictment, but a sufficient venue in the margin, showing "the court" "to have had jurisdiction over the offence." [PATTESON, J., mentioned *Rex v. Burridge*, 3 P. Wms. 439, 496. COLERIDGE, J. The count here makes no reference to the county in the margin. Your argument must be merely that the jury would not have inquired into the facts alleged if they had not appeared to be in that county.] If a jury of that county has found that the crime was committed, the words of the clause are satisfied. When the grand jury of the county has found a bill, the court, that is the judge and jury, will have jurisdiction to try: if it appear by evidence that the facts did not occur within the county, that is ground of acquittal (as it would be even if the count gave a perfect venue;) but the jurisdiction is not affected. [COLERIDGE, J. The court ought to be able to say before the trial whether jurisdiction exists or not.] Jurisdiction does not appear, if there be a proper statement of a venue in the margin. [PAT-

TESON, J. The statute assumes that there will be some cases in which the court would not appear "by the indictment or information" to have had jurisdiction.] That would be so if the marginal venue were Lancashire, and the facts were laid in Cheshire. [PATTESON, J. There the fault would be an improper venue.] Want of jurisdiction may appear, not only by the venue but by the nature of the charge, as if a bill be found at quarter sessions, or under a special commission, for an offence not triable there. *Rex v. John Minter Hart*, 6 Car. & P. 123, was cited in moving for the rule; but there the objection was not taken "after verdict." The court directed an acquittal. [PATTESON, J. I suppose the judges thought  
 \*24] "the indictment would be clearly bad on motion in arrest of judgment, and therefore ordered an acquittal. Lord DENMAN, C. J. Many criminal cases are so decided, under the impression that, if the prisoner will be ultimately entitled to go free, he ought to go free at once.] In *Regina v. Mitchell*, 2 Q. B. 636, which may also be cited, the venire was wrong; and that was clearly a defect not cured by stat. 7 G. 4, c. 64, s. 20.

The argument for the crown having been concluded, and the case adjourned, on May 26th, the court, on May 27th, directed that counsel, in supporting the rules, should confine themselves, for the present, to the question of venue. Lord DENMAN, C. J., mentioned *Rex v. Stott*, 2 East's P. C. 751, 753, 780, as a case apparently much in point. On June 3d, *Erle, Dundas, Baines, Murphy*, Serjt., *Bodkin*, and *Atherton*, supported the rules, on behalf, respectively, of different defendants. The principal offence charged in the 4th count is the riotous assembling and impeding of labour. The acts charged on the defendants are such as would clearly have made them accessories only if the indictment had been for felony. If, then, the offence charged against the principals is not properly laid, the whole count fails. It is consistent with the averments that the principal offence was committed or to be committed abroad, in which case the aiding or encouraging here would not be an offence unless made so by some particular statute. There may, it is true, be a complete misdemeanor independent of the principal offence, as by soliciting; but the present case  
 \*25] is not of that kind. And, even assuming \*that such a distinct offence were here alleged, still the riotous assembling and impeding of labour are essential facts; and, in an indictment, "the time and place ought to be repeated to every material fact:" Com. Dig. *Indictment*, (G. 2,) citing *Buckler's Case*, Dyer, 69 a and *Rex v. Hollond*, 5 T. R. 607, 620, 625; *The Lady Russel's Case*, Cro. Jac. 17; *Rex v. Haynes*, 4 M. & S. 214; 1 Stark. Crim. Pl. 62, 2d ed. The passage cited on the other side from *Rex v. Burdett*, 4 B. & Ald. 138, adds nothing to the argument. Where a charge is made up of several transactions, each of which is a misdemeanor, the indictment may be preferred in any county where a substantive misdemeanor, alleged in the indictment, was committed; and the venue assigned to the other facts will be unimportant un-

less they are local in their nature ; but every material fact must have a venue. *Bouche's Case*, Cro. Eliz. 200, and note (3) to *Mellor v. Walker*, 2 Wms. Saund. 5 c, d, e, 6th ed. point out the rules on this subject.

The argument, on behalf of the crown, that the statements of aiding and encouraging may be treated as allegations of a substantive offence, and the previous narrative of unlawful assembling, &c. as mere inducement, is not borne out by the cases ; for the allegation, that the defendants did unlawfully “aid, abet, assist, comfort, support and encourage” the parties first mentioned to continue doing the acts already stated, cannot be separated from the narrative of those acts so as to constitute an independent charge of misdemeanor. In *Rex v. Fuller*, 1 B. & P. 180, the endeavouring to seduce was an act made penal in express terms by a statute, on which the indictment was framed. It was indeed held, in *Rex v. Higgins*, 2 East, 5, that soliciting and inciting a servant to embezzle goods of his master was well laid as an indictable offence [\*26 at common law, without any averment of an actual theft ; but that is a clear and definite charge, and implies at least communication with the person who is intended to commit the crime. [PATTESON, J. “Support and encourage,” here, seem to imply some aid given in what the party was actually doing.] *Rex v. Lady Lawly*, Fitzgib. 122, 263, does not affect this case : the indictment charged that she, knowing that J. C. was indicted for forgery, endeavoured to keep away a material witness for the crown. The endeavouring, there, was the gist of the offence, and appears to have been laid with sufficient certainty. [Lord DENMAN, C. J. It would have been no offence if no trial had been pending.] *M'Daniel's Case*, Fost. Cr. L. 121, shows that abetting, and other words descriptive of such conduct as makes an accessory before the fact in felony, do not necessarily imply immediate personal communication. [PATTESON, J. There may be a misdemeanor in soliciting, though it be not shown that the suggested offence was committed ; but I do not see how, in such a case, a person could be charged as an accessory before the fact.] No instance of the kind can be found.

The case of *Rex v. Slott*, 2 East's P. C. 753, 780, is thus stated in East's Pleas of the Crown.” The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods : it is sufficient if they be alleged to the fact of the receipt. This was expressly decided upon consideration in *Slott's Case*, upon an indictment against him as a receiver of pieces of iron, which was removed into B. R. by writ of error after judgment against him of imprisonment by the quarter sessions ; though ultimately the court gave no opinion on the rest [\*27 of the case, the writ of error being abandoned by the prisoner. It appeared on inquiry of the clerks of assize of the Western and Oxford circuits, and of the clerks of the arraigns at the Old Bailey, that such had always been the form of indictment used by them.” It appears that the

prisoner there was indicted for the substantive misdemeanor, created by statute, 29 G. 2, c. 30, s. 1, (a) of receiving "stolen" iron, knowing it "to be stolen." If he had been charged as an accessory, the time and place of the stealing must have been shown. But in the case there presented the term "stolen" merely implied a quality of the goods which, by the statute, made it unlawful to receive them: it was as if they had been averred to be French, or of a particular colour. And the case is at any rate anomalous; no grounds are assigned for the supposed decision; and the defendant appears to have abandoned his writ of error for a reason not affecting this point. [COLERIDGE, J. The precedents, in 2 Stark. Crim. Pl. 483, 4, of indictments for misdemeanor in receiving stolen goods, appear to be framed on *Stott's Case*, 2 East's P. C. 751, 753, 780.] A party may commit the offence of receiving stolen goods without knowing the circumstance of the theft; therefore in *Regina v. Caspar*, 2 Moo. C. C. 101, S. C. 9 Car. & P. 289, where the indictment stated that "a certain evil-disposed person" stole, and certain of the defendants feloniously received, they were held to be sufficiently charged with a substantive felony; but in the case of another defendant, charged as accessory before the fact, the same inducement was held not sufficient. *Stott's Case*, 2 East's P. C. 751, 753, 780, if correctly stated and rightly decided, is an exception to general \*rules; which rules, according to Lord Hale's Summary, (b) \*28] cited by BAYLEY, J., in *Rex v. Burdett*, 4 B. & Ald. 155, extend to misdemeanor as well as to felony.

It is shown in 4 Hawk. P. C. 18, B. 2, c. 25, s. 34, (7th ed.) that a proper venue is necessary to give jurisdiction to the grand jury; and that for this reason, if it do not appear by the indictment that the offence arose within the county, &c., for which the grand jury was returned, it is a fatal exception; and their finding even of a collateral matter, expressly alleged to have happened in a different county, has been considered void. It is added: "Some have holden, that if the county be expressed in the margin of an indictment, the vill or vills in which the offence is laid, shall be intended to be in the same county. But the greater number of authorities require a greater certainty." That the marginal venue, though it may help the want of averments in a declaration, will not aid in a criminal case, where the facts are not alleged with a proper venue in the body of the indictment, appears from *Hamond v. The Queen*, Cro. Eliz. 751; *Rex v. Yurrington*, 2 Keb. 302; *Shelley v. Wright*, 2 Com. Rep. 562, and *J. M. Hart's Case*, 6 C. & P. 123; and this doctrine appears to have been recognised in *Rex v. Fraser*, 3 Burn's Justice, 383, ed. D'Oy. & Wms. tit. *Indictment*, IX. (4;) S. C. 1 Moo. C. C. 407, where the indictment was found in Middlesex, and was held bad for want of jurisdiction, because

(a) See 2 East's P. C. 751.

(b) Pleas of the Crown: Or. a Methodical Summary of the Principal Matters relating to that Subject. By Sir M. Hale, p. 203, 5th ed. 1716.

those parts of the indictment in which a venue should have appeared were left blank. *Rex v. Connop*, 4 Ad. & E. 942, also bears upon this point. The *Anonymous Case* in \*Keilwey, 33 b, pl. 6, and *Leach's Case*, Cro. Jac. 167, cited on the other side, contain nothing on [\*29 the present subject but extrajudicial dicta. The decision in *Rex v. Butler*, 2 Keb. 303, also cited for the crown, was that the court would not intend a place named in the body of the indictment without "*prædict.*" to be the same with that named in the margin. And it is well established that no such reference by intendment will be made to the marginal venue in an indictment, though in a declaration it may. This distinction between civil and criminal cases is pointed out in *Regina v. Rhodes*, 2 Ld. Ray. 886; *Anonymous Case*, 2 Lord Raymond, 1304; *Rex v. Burridge*, 3 P. Wms. 496, 497; *Shelley v. Wright*, 2 Com. Rep. 562; note (1) to *Rex v. Kilderby*, 1 Wms. Saund. 308, 6th ed.; and *Lenthal's Case*, Cro. Eliz. 137, and *Child's Case*, Cro. Eliz. 606, there cited. The marginal venue in a declaration shows where the action is laid; in an indictment it merely refers to the caption, and shows where the grand jury found the bill, not where the offence is supposed to have been committed: this appears from 2 Hale's P. C. 165, 166, part 2, c. 23. *Rex v. J. M. Hart*, 6 Car. & P. 123, is a case in point. The objection there was not raised by demurrer, and must clearly have been considered as if taken after verdict.

The last cited decision, and the preceding observations, if correct, show that the objection to the fourth count in this case is not cured by stat. 7 G. 4, c. 64, s. 20, which remedies only the "want of a proper or perfect venue, where the court shall appear by the indictment" "to have had jurisdiction over the offence." Want of a proper or perfect venue does not mean the \*omission of any. The defect would be such as the statute contemplates, if it were alleged that the defendant broke [\*30 and entered the house of A., situate at the parish of B.; because, the house being there, it must be taken that the breaking was committed there. So if a vill were described as a parish. The ambiguity in *Ogle's Case*, 2 Hale's P. C. 180, would probably come within the meaning of the statute. When it is said that the court must appear by the indictment to have had jurisdiction, "the court" does not mean the grand jury, but the justices who sit under a certain commission to try; and they are to ascertain the jurisdiction, not from the marginal venue, which is matter of caption merely, but from the body of the indictment, where the jurisdiction must appear from two circumstances, the nature of the offence, and the place where the facts are stated to have occurred. If the jurisdiction depended on the naming of a venue in the margin, the court would always have jurisdiction, as to place, from the mere circumstance of the grand jury having found a bill.

The supposed analogy to cases under stat. 16 and 17 Car. 2, c. 8, s. 1, does not hold. By that clause, the objection, "that there is no right venue," shall not prevail after verdict, "so as the cause were tried by a

jury of the proper county or place where the action is laid." The intention there was to meet the objection that there had been a mistrial, in cases where some material fact was alleged with a wrong venue or none, provided that the cause of action was laid with a proper venue and the trial was had according to such venue. *Skinner v. Gunton*, 1 Saund. 228, shows this. Stat. 7 G. 4, c. 64, s. 20, does not make a corresponding

•31] provision for criminal cases; \*which therefore stand in the same situation as civil cases before the statute of Charles; and the courts would not then have presumed after verdict that the jury had authority to try, merely because a right venue appeared in the margin of the declaration.

The fifth count, which contains no statement at all as to place, is clearly bad, unless the marginal venue aids it and may be imported into the count without any words of reference. *Cur. adv. vult.*

Lord DENMAN, C. J., in Trinity term, (June 7th,) 1843, delivered judgment as follows.

We are now to dispose of the objections arising from the want of a venue. None is stated in the fifth count; and at common law it is plainly a bad count for that reason. Every material fact must be stated with time and place in order that the grand jury may appear to have jurisdiction to find the bill, and also that the petty jury may be drawn from the proper county to try the case. This is laid down in all the books and authorities cited at the bar: and indeed the count was scarcely defended at the bar as good at common law, neither containing any venue within itself, nor referring to the county written in the margin. Recourse must then be had to stat. 7 G. 4, c. 64, s. 20, enacting that no judgment after verdict, or confession, or default, shall be stayed "for want of a proper or perfect venue," provided it "shall appear by the indictment" that the court "had jurisdiction over the offence."

Now, whether the total omission of a venue can be considered as cured by those words, or whether they are to be confined to cases where some

•32] venue is stated, \*though imperfectly or improperly, in either case the condition on which the remedy is given by stat. 7 G. 4, c. 64, is that the court shall appear by the indictment to have had jurisdiction over the offence.

If this means local jurisdiction, the fifth count does not show it: for no place is mentioned in the body of it; and we cannot, as already stated, import into it for this purpose the county noted in the margin, as has been done in civil actions. To hold this would be to say, as was indeed said by the solicitor-general, that, wherever a grand jury of any county has found a bill of indictment for a crime cognisable under the commission, a trial which takes place upon it in that county must be good after verdict, though the indictment may not show the court to have any local jurisdiction over the offence, on which condition only the defect is cured by the statute. The argument drawn from stats. 16 and 17 Car. 2, c. 8, and 4

Ann. c. 16, was that, as in civil actions the total omission of a venue is cured by the former under the words "for that there is no *right* venue," so the total omission of venue in criminal cases may be cured by stat. 7 G. 4, c. 64, under the words "for want of a proper or perfect venue." But the defect cured in civil actions is not the total omission of venue, but a wrong venue; and it is cured by the statute of Car. 2, if "the cause were tried by a jury of the proper county or place where the action is laid." Now the action in every civil case is laid in the county stated in the margin; and, if the trial takes place in that county, the condition is fulfilled. By stat. 4 Ann. c. 16, the remedy is extended to cases of judgment by default, all the defects which would have been cured by any of the statutes of jeofails, in case a verdict of twelve men had been \*given in such actions, being expressly cured by the second section of that statute. To bear any analogy to these statutes, the statute of 7 G. 4, should have cured defects of venue where the cause was tried by a jury of the county in which the indictment is preferred. The venue in the margin may show this, but certainly does not make the indictment show that the court had jurisdiction to try the offence unless it be specially referred to in the body of the indictment. The distinction between civil and criminal cases in this respect has been established in so many cases that it is impossible for this court to overlook or neglect it: *Rex v. Rhodes*, 2 Ld. Ray. 886; *Lenthal's Case*, Cro. Eliz. 137; *Rex v. Burridge*, 3 P. W. 439, and *Rex v. Fosset*, 3 P. Wms. 497, there cited. Other cases were referred to in the argument. It follows then, as the court cannot connect the body of the indictment with the margin in this case for want of such special reference, that it does not appear by the indictment that the court where the indictment was found had jurisdiction, and that the defect is not cured by the statute 7 G. 4, c. 64, s. 20. [\*33]

The court has considered whether the words of that statute may not admit of a different and a wider meaning, viz. that the offence shall appear to be of such a nature that the court has authority to try it; and a strong argument in favour of this construction arose from the apparent impossibility of giving effect to the words in any other manner. But we are satisfied that such is not the case, and are convinced that defects of venue are not intended to be cured, unless the jurisdiction of the court in respect of locality is made to appear.

\*One consideration is decisive on this point. Persons accused might be punished for offences committed in another realm, if the quality of the offence alone gave jurisdiction. This clearly was never intended. Mr. Dundas referred to a case reported not quite correctly in the last edition of Burn's Justice.<sup>(a)</sup> It is also reported in 1 Moody's Crown [\*34]

(a) *Rex v. Fraser*, 3 Burn's Justice, 383, ed. D'Oy. & Wms. tit. *Indictment* IX. (4.) Patteson, J., at the conclusion of the present judgment, said that the error in the late edition of Burn was imputable to himself, the note of *Rex v. Fraser*, as printed, having been given to the editors by him.

**Cases, p 407.(a)** I now hold the very case on which the opinion of all the judges was taken, and a copy of the indictment itself. The prisoner was tried for bigamy at the Old Bailey, in 1833. The first marriage was alleged to have been contracted in Kent; the second in Surrey: he was alleged to have been apprehended on a day named; but of the place or county in which he was apprehended no mention was made. The conviction was held bad, the felony being proved in Surrey, while the venue in the margin was Middlesex. But no suggestion was offered that Middlesex could be drawn from the margin into the body of the averment of his apprehension, though that would have unquestionably cured the defect, stat. 9 G. 4, c. 31, s. 22. Nor did it occur to any one that the conviction could be upheld by the offence of bigamy being such a one as falls within the jurisdiction of the court. The objection on the score of omitting a local venue is not merely technical, but is real and important; for the allegation of material facts as occurring in the county is not only that which  
 \*35] alone authorizes the grand jury to entertain \*the bill of indictment, and generally empowers the court to proceed against the offenders, but is also the sheriff's warrant to summon the petty jury who must pass between the crown and the prisoner. In case of an indictment against witnesses for perjury, their trial might be greatly embarrassed, and perhaps justice defeated, where the jury should appear to have been empannelled to try without authority. To make the act of trying confer the right without some express provision against those consequences would be a change so violent that we cannot believe it to have been intended by the legislature.

We are therefore of opinion that judgment on the fifth count must be arrested.

An objection was also taken to the fourth count on the score of venue, a material fact being alleged without place. *Stott's Case*, 2 East's P. C. 751, 753, 780, was thought to bear directly on this doctrine, and was not successfully distinguished in the argument. But the master of the crown office has found the paper book in that case, on which ASHURST, J., took his note of the argument, conducted by Lord ABINGER on the one side, and the late Mr. Justice VAUGHAN on the other, in Michaelmas term 1798. The endorsement of that learned judge intimates that the case stood for further argument. The prisoner was convicted in April, and then sentenced to twelve months' imprisonment, more than half of which had expired before the argument; and there is every reason to suppose that Sir E. H. East is mistaken in reporting that case as decided. Indeed he himself intimates, page 753 that, if there  
 \*36] was error in the sentence, it might possibly have been amended by being changed into transportation for fourteen years, and that the prisoner's counsel was aware of the danger that might attend the success of his argument.

(a) See *Regina v. Hinley*, 2 Moo. & Rob. 524, 530.

We think, however, that here the statute of 7 G. 4, applies a remedy, as the conduct imputed as criminal to the defendants is stated with a venue. The count avers unlawful assemblies at divers places not named, as introductory of the charge against the defendants, which is the aiding and assisting persons to continue the said assemblies; and that aiding and assisting is laid in Lancashire. The count, therefore, has a venue, though an imperfect one, because the introductory averment of a material fact is without place, but the charge against the prisoners has a venue, and refers to the former part of the count, which former part may therefore be fairly said to have an imperfect venue: and, as the offence is laid with a proper venue, the court appears by this count to have jurisdiction over it.

We are hence of opinion that this count may be supported by force of stat. 7 G. 4, c. 64, notwithstanding the objections to its venue.

Judgment arrested on the fifth count.(a)

In the same term, June 9th, counsel were further heard in support of the rule for arresting the judgment on the fourth count, and contended that the count, in several respects, failed to show an indictable offence committed by the defendants. The court took time for consideration, but no judgment has yet been given.

(a) See the next two cases.

### \*The QUEEN v. MYER ALBERT.

[\*37

An indictment for misdemeanor, found at the Central Criminal Court, had in the margin the words, "Central Criminal Court;" and stated that M. A., "late of the parish of St. Stephen, Coleman street, in the city of London, and within the jurisdiction of the said court, labourer," intending, &c., on, &c., "at the parish aforesaid, and within the jurisdiction," &c., unlawfully, &c.; alleging the offence without further statement of venue.

The indictment was removed by certiorari, and tried in London, and the defendant convicted. On motion in arrest of judgment:

*Stable*, that the venue assigned to the material fact appeared sufficiently to be in the city of London: and *Held*, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by stat. 7 G. 4, c. 64, s. 20; for that the indictment showed jurisdiction in the court at nisi prius to try the case in London.

This was an indictment for unlawful exposure of the person, and commenced as follows.

"Central Criminal Court, to wit. The jurors for our lady the queen upon their oath present that Myer Albert, late of the parish of St. Stephen, Coleman street, in the city of London, and within the jurisdiction of the said court, labourer, being a person of most wicked," &c., "mind and disposition," &c., "and intending as much as in him lay to vitiate and corrupt the morals of her majesty's liege subjects," &c., "on the 12th day of May in the fourth year," &c., "with force and arms, at the parish aforesaid, and within the jurisdiction of the said court, unlawfully," &c. "did ex-

pose" &c., "with intent to vitiate and corrupt the morals of her majesty's said liege subjects," &c.

No further reference was made to venue than as above stated. There were two other counts, not materially differing from the first.

The indictment was removed into this court by certiorari, and tried at the sittings in London after Michaelmas term, 1841; when the defendant was convicted. In the ensuing term a rule nisi was obtained for arresting the judgment. In last Trinity term,

*Gurney* showed cause. The objection is, that nothing appears by the  
 \*38] indictment to show jurisdiction in the court to try the case at nisi prius in London. Stat. 4 & 5 W. 4, c. 36, s. 1, constitutes judges of a court to be called the "Central Criminal Court." Sect. 2 empowers the crown to issue commissions of oyer and terminer to inquire of, hear and determine all treasons, &c., and misdemeanors committed within the city of London and county of Middlesex, and within certain parts of counties, parishes, parts of parishes, and other districts, and empowers the before-mentioned judges to hear and determine all felonies, misdemeanors, &c., which might be heard and determined under any commission of oyer and terminer for London or Middlesex, or might have been heard, &c., under such commission for the other districts, &c., named if they had been counties of themselves. Sect. 3 enacts,

"That the district situated within the limits of the jurisdiction hereinbefore established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows, 'Central Criminal Court to wit;' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court be laid to have been committed and averred to have taken place within the jurisdiction of the said court."

Supposing that no other venue were stated here than "Central Criminal  
 \*39] Court," the question would be, as in *Regina v. Stowell*, post, p. 44, (now depending,) whether stat. 4 & 5 W. 4, c. 36, authorized the trial of such an indictment in any county or place except before the Central Criminal Court. To hold that it does not would prevent the use in future of the short form provided by sect. 3. And the words "indictments and presentments preferred and tried before the said justices and judges" may reasonably be construed to mean indictments preferred and presentments tried. The term "preferred" does not seem applicable to presentments. But, at all events, this case differs from *Regina v. Stowell*, post, p. 44, because, in the body of the present indictment, the de-

defendant is said to be "of the parish of St. Stephen, Coleman street, in the city of London," and the offence is to have been committed "at the parish aforesaid." It is objected that the parish may not be wholly within the city, and the indictment should have laid the offence as committed in the parish and also within the city. But the court will not assume, in the absence of proof, that the parish was partly within and partly without the city. In *Rex v. Perkins*, 4 Car. & P. 363, the prisoner was indicted for a larceny "at the parish of Hales Owen, in the county of Worcester;" it appeared that in fact the parish was partly in Worcestershire and partly in Shropshire; and the defendant's counsel objected that the fact should have been laid as "in that part of the parish of Hales Owen, which is situate in the county of Worcester;" but the objection was overruled. The decision in *Rex v. Burridge*, 3 P. Wms. 439, 496, that the court could not intend the whole township or vill of Ivelchester to be in the county of Somerset, may be relied upon for the defendant, but is contrary to the authority just cited. And the present objection, if borne out by *Rex v. Burridge*, 3 P. Wms. 439, 496, is cured by stat. 7 G. 4, c. 64, s. 20, the defect being only the "want of a proper or perfect venue," and the indictment showing that the court which tried had jurisdiction. It may also be urged that "then and there" should have been inserted after the words "with intent." But the earlier part of the count was an averment of intention sufficiently connected with the venue. And intention is not material to an offence of this kind; *Rex v. Crunden*, 2 Camp. 89. [\*40]

*M. Chambers*, contra. The question is, whether the court, that is the judge and jury who tried this case, appear by the indictment to have had jurisdiction. Unless that be so, the statute will not aid. If the parish were without the city, there would have been a mistrial, the London jury being incompetent to try. Now, in the first place, the "parish of St. Stephen, Coleman street, in the city of London, mentioned as part of the defendant's addition, cannot be referred to in the subsequent part of the count, so as to make up an averment of venue; *Sutton v. Fenn*, 3 Wils. 339; the addition not being a substantive and traversable allegation in the indictment. Stat. 4 & 5 W. 4, c. 36, s. 3, enacts that the district to be comprised under the words "Central Criminal Court" shall "in all cases tried before the said justices and judges" be deemed one county for all purposes of venue, local description, trial, &c.; and that, in all indictments "preferred and tried" before the said justices and judges, the marginal venue shall be "Central Criminal Court," and the material facts laid as committed and taking place "within the jurisdiction of the said court." But this does not apply to indictments preferred before the justices and judges of that court and tried elsewhere; nor does the clause provide for that case. The objection would have been obviated if the indictment had said that the offence was committed at the parish of St. Stephen, Coleman street, in the city of London; but the

court will not intend that the whole parish is within the city; *Rex v. Burrige*, 3 P. Wms. 496, 497, and *Parker v. Sadd*, 1 Sid. 345, there cited, nor, if part be without the city, that the offence was not committed in that part. [Lord DENMAN, C. J. Stat. 22 Car. 2, c. 11, "for the rebuilding of the city of London" after the fire, speaks, in sect. 62, of the parishes to be settled "within the said city," and mentions among them, in sect. 63, "St. Stephen's Coleman street."(a) The court will not say that there is not another St. Stephen's Coleman street, partly in London and partly without. [Lord DENMAN, C. J. I think we may venture to do that. PATTESON, J. If your objection affects the indictment itself, and the indictment was good when found, it could not become bad by being removed.] The objection is to the trial. There was no power to try in London, for want of a proper description of place in the body of the indictment. [PATTESON, J. The question then is, whether we can find any thing in the indictment authorizing the court to award a venire into London.] *Regina v. Stowell*, post, p. 44, is like this case, but that the indictment there mentions no parish or county.

\*42] \*Lord DENMAN, C. J. The objection, as now presented to us, brings the question to this: whether the parish of St. Stephen Coleman street sufficiently appears by the indictment to be in the city of London. The act 22 Car. 2, c. 11, shows that it is within the city; and, where an indictment mentions a parish in a county, and afterwards an act is alleged to have been done in the "county aforesaid," that averment as to place is sufficient. If the case in *Peere Williams*,(b) raised any doubt, the objection is cured by stat. 7 G. 4, c. 64, s. 20.

PATTESON, J. The ruling in *Rex v. Burrige*, 3 P. Wms. 496, goes a great way, because there the charge of aiding an escape "at Ivelchester" was tied up, by the word "aforesaid," to "Ivelchester" in the county of Somerset. It is said here, as in that case, that the court cannot take notice that part of the parish is not without the city of London. The objection, however, if available, is cured by stat. 7 G. 4, c. 64, s. 20. The words "parish aforesaid," here, refer, not to the margin of the indictment, but to something in the indictment itself. It is true, that is only the defendant's addition; but it is a statement in the body of the count. The defect, at most, is only an imperfect venue, and cured by stat. 7 G. 4, c. 64, s. 20, the court which tried the case appearing by the indictment to have had jurisdiction. This court has jurisdiction over an indictment removed into it, let the venue be where it will; and, as to the indictment itself, if it was good on the face of it, it does not become bad by being removed. It may be that the court had not jurisdiction to send the case

\*43] into London for trial unless \*something appeared in the indictment to authorize that course; but here I think enough did appear.(c)

(a) Gurney mentioned also stat. 22 & 23 Car. 2, c. 15, s. 2, (16.)

(b) *Rex v. Burrige*, 3 P. Wms. 439, 496.

(c) See *Rex v. Connop*, 4 A. & E. 942.

WILLIAMS, J. Supposing the question of venue to be fairly at issue in this case, and that there is weight in the objection (to which some consideration is certainly due out of respect for the ruling in *Rex v. Burridge*, 3 P. Wms. 496, though the proposition there is not to be easily understood,) I think stat. 7 G. 4, c. 64, s. 20, cures the defect. Mr. *Chambers* admits that, if the offence had been laid as committed "at the parish of St. Stephen, Coleman street, in the city of London," it would have been sufficient: and, if so, the fault is only an imperfect venue. As to the question of trial, enough appears to show that the jury was properly directed to come from the city of London.

COLERIDGE, J. There is enough to show that this case was tried by a jury competently assembled, if the allegation that the defendant did the act "at the parish aforesaid" be read by the rules of common sense. It is argued that the word "aforesaid" is ineffectual because it refers only to the description of the defendant, which is immaterial. But it is unimportant how the name of the place is stated in the beginning: "aforesaid" has the same effect as if the words were repeated. The question is, whether they are here repeated with enough precision in the place where the offence is charged; and I think they are so. Rule discharged.(a)

(a) See the next case.

### \*The QUEEN v. STOWELL.

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An indictment was preferred in the Central Criminal Court, the venue in the margin being "Central Criminal Court to wit," and the material facts being laid only as having taken place "within the jurisdiction of the said court." The defendant, having removed it by certiorari, was tried at nisi prius in Middlesex, and found guilty. Judgment arrested, the description of place not being made sufficient, by stat. 4 & 5 W. 4, c. 36, s. 3, in cases not tried at the Central Criminal Court, and the defect not being cured by stat. 7 G. 4, c. 64, s. 20, the Nisi Prius Court not appearing "by the indictment to have had jurisdiction over the offence."

This court refused, after verdict, to enter a suggestion for a trial in Middlesex, *nunc pro tunc*. And, *semble*, such an application would not be granted at any period.

An indictment preferred in the Central Criminal Court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And, if that has not been done, it should be made a condition of the removal by certiorari that defendant consent to the insertion.

INDICTMENT for misdemeanor, preferred at the Central Criminal Court, September, 1841. The marginal venue was "Central Criminal Court, to wit." Throughout the indictment, the only allegation of the place of committing the alleged crime was "within the jurisdiction of the said Central Criminal Court."(a) The \*indictment was removed by certiorari at the defendant's instance and tried before Lord [\*45

(a) The first count of the indictment was as follows.

"That hereofore, to wit on the 11th day of May, A. D. 1841, and within the jurisdiction of the said Central Criminal Court, John Rawlinson, Esquire, then being one of the

DENMAN, C. J., at the Middlesex sittings after Hilary term, 1842, when the defendant was found guilty. In Easter term, 1842, M. \*Chambers obtained a rule nisi for arresting the judgment. In Michaelmas vacation (November 26th) 1842,(a)

*R. V. Richards* showed cause, and *M. Chambers* supported the rule. Besides the authorities referred to in the judgment, the following were

magistrates of the police courts of the metropolis sitting at the Police Court in Marylebone, within the metropolitan police district, in due form of law did make his warrant of commitment under his hand and seal, to wit at the parish of St. Marylebone, in the county of Middlesex, and within the jurisdiction of the said court, bearing date the same day and year aforesaid, directed to the keeper of her majesty's jail of Newgate or his deputy; by which said warrant it was directed that the said keeper of her majesty's jail at Newgate, or his deputy, should receive into his custody the bodies of John Williams and John Wakeling, charged before the said J. R. Esquire, one of the magistrates," &c., "sitting at the Police Court in Marylebone, within the metropolitan police district, upon the oath of Esther Stanley and others, with feloniously stealing, taking and carrying away from the person of the said Esther Stanley one purse," &c., "the property and moneys of the said Esther Stanley, within the jurisdiction of the Central Criminal Court, against the statute," &c.: "and the said J. R. Esquire, so being such magistrate as aforesaid, under the authority of an act of parliament," &c. (4 & 5 W. 4, c. 36, "did thereby commit the said John Williams and John Wakeling to the said jail of Newgate, and did thereby require the keeper thereof them safely to keep until they should be discharged by due course of law: as by the same warrant more fully appears: by virtue of which said warrant of commitment, afterwards, to wit on the day and year aforesaid, at the parish aforesaid, and within the jurisdiction aforesaid, the keeper of the said common jail did receive the said John Williams and John Wakeling into his custody in the said common jail." "That heretofore, to wit on the day and year aforesaid, at the parish aforesaid, and within the jurisdiction of the said court, one Esther Stanley, late of the said parish, spinster, appeared before the said J. R., so being such magistrate as aforesaid, and did then and there give evidence against the said John Williams and John Wakeling upon the charge aforesaid, which evidence was material in the prosecution of the said charge upon which they the said John Williams and John Wakeling were so committed as aforesaid: and she, the said Esther Stanley, was then and there bound over by the said J. R., so being such magistrate as aforesaid to appear at the next session of oyer and terminer and jail delivery to be holden for the jurisdiction of the Central Criminal Court at the Justice Hall in the Old Bailey, and then and there prefer a bill of indictment and prosecute the law with effect, and give evidence in her majesty's behalf against the said J. W. and J. W. for feloniously stealing," &c., "from the person of the said Esther Stanley one purse," &c., "the property and moneys of the said Esther Stanley, within the jurisdiction of the said court, against the peace, &c.: "and, if the bill should be found a true bill, that then the said Esther Stanley should also appear in the said Central Criminal Court, and then and there prosecute," &c., "and not depart the said Central Criminal Court without leave." "That Thomas Stowell, late of the said parish, and within the jurisdiction of the said court, labourer, well knowing the premises, but being an evil disposed person, and contriving and intending to obstruct and impede the due course of justice, afterwards, to wit on," &c., "and within the jurisdiction of the said court, unlawfully and unjustly endeavoured to persuade, hinder and prevent the said Esther Stanley from appearing at the trial of the said J. W. and J. W. on the charge aforesaid, to testify the truth and give evidence at the trial of the said J. W. and the said J. W. for the said offence, for which they the said J. W. and J. W. were so committed as aforesaid. To the great obstruction, hindrance and delay of public justice," &c.

There were three other counts, not differing from the first, so far as regards the point stated in the text.

(a) Before Lord Denman, C. J., Coleridge, and Wightman, Js.

mentioned: *Regina v. Smith*, 2 Moo. & Rob. 109; *Rex v. J. Minter Hart*, 6 C. & P. 123; 1 Chitt. Cr. L. 661, (2d ed.); 1 Stark. Cr. Pl. 62, (2d ed.)  
*Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (June 24th) delivered the judgment of the court.

The objection taken to this indictment was, that it did not show the offence to have been committed in Middlesex, by a jury of which county it had been tried at nisi prius in the Queen's Bench. It had been preferred and found at the Central Criminal Court, and removed by the defendant by certiorari into this. The form of the indictment followed sect. 3 of stat. 4 & 5 W. 4, c. 36, which enacts, &c. (His lordship here read sect. 3, set out in *Regina v. Albert*, ante, p. 38.)

No provision is specifically made, either as to the form of the indictment or the jurisdiction for trial, in the case of indictments removed by certiorari into this court. It was urged that we might read the words "preferred *and* tried" as if they were "preferred *or* tried," and that this case would then be provided for \*under the former alternative. [\*47  
 And, as regards the venue in the margin, this would be so: but it would leave the difficulties which arise as to the trial untouched. In *Rex v. Connop*, 4 A. & E. 942, this court directed a trial in Surrey, where the offence was charged in the indictment to have been committed, the margin containing the statutable venue "Central Criminal Court to wit." And we have lately held, in *Regina v. Albert*, ante, p. 37, that the trial of all indictments preferred at the Central Criminal Court, and containing that marginal venue, may be properly had in the county where it shows the offence to have been committed. But no one of the five counties over which the jurisdiction of that court extends appears in the present indictment.

It was argued that stat. 7 G. 4, c. 64, s. 20, might cure the defect, because over an indictment removed by certiorari this court has undoubted jurisdiction. But it has no jurisdiction for the purpose of trial; for there is no district from which the jury can be drawn, and no officer to whom the process for summoning them can be directed. The court, therefore, which sat under the commission of nisi prius for Middlesex, did not appear by the indictment to have that jurisdiction.

We were pressed to take this objection from the record, by entering, *nunc pro tunc*, a suggestion directing the trial in Middlesex. But we are not satisfied of our power to do this, even if required before the trial; and, if we possessed that power, should be very slow to exercise it. Nor can we conceive any circumstances in which we should make such an alteration when first moved to do so after trial. The objection must therefore prevail.

\*The consequence is that, in indictments preferred in the Central Criminal Court, an ordinary venue should be laid for the material facts, as well as that in the margin describing the jurisdiction. And, when

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such venue may not appear in the indictment, no certiorari should be granted for the defendant, except on condition of his consenting to its introduction.

The judgment in this case must be arrested.

Rule absolute.

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The QUEEN v. Lord ASHBURTON and Others.

**INDICTMENT** for conspiracy, preferred at the Central Criminal Court, and removed into this court, at the defendants' instance. A rule was obtained in Michaelmas term, (November 9th,) 1843, calling on the defendants to show cause why a procedendo should not issue, or why the indictment should not be amended by inserting a proper venue. The indictment had the marginal venue "Central Criminal Court;" and the offence was laid to have been committed "within the jurisdiction of the said court;" but there was no other statement of venue. The bill was found at the sessions holden February 3d, 1842, and the case stood for trial at the sittings in London after Trinity term, 1843. Shortly before the day appointed for the trial, judgment was given in *Regina v. Stowell* (suprà:) and the prosecutor, being thereupon advised that he could not safely proceed, took out a summons to postpone the trial, which the defendants consented to. The present motion was then made.

Sir W. W. *Follett* and *Kelly* now showed cause, and objected to a procedendo, the difficulty having been caused by the prosecutor's own fault, but consented to the proposed amendment. *Erle*, contra, was not heard.

Lord DENMAN, C. J.—Under the authority of the court and with consent of parties, this amendment may be made. The court is jealous of allowing an indictment to be amended in the case of ignorant parties; but here there can be no doubt.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

The following order was made. "Upon hearing counsel on both sides, and by consent, it is ordered that the indictment in this prosecution be amended by inserting therein a proper venue."

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\*49] \*The QUEEN v. THOMAS KENRICK the elder and THOMAS KENRICK the younger.

An indictment charged that A. and B. conspired, by false pretences and subtle means and devices, to obtain from F. divers large sums of money, of the moneys of F., and to cheat and defraud him thereof. The means of the alleged conspiracy were not stated, except as above.

*Held* sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that horses were the property of a private person, and not of a horsedealer, thereby inducing F. to buy them.

A false pretence, knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make.

A. and B. having pleaded not guilty to an indictment for conspiracy, B. died between the venire and distringas. A. was tried alone, and found guilty. *Held* not a mistrial. Admitted, that an indictment for false pretences must state whose moneys, &c., it was intended to obtain by the pretence.

**INDICTMENT**, found at the Middlesex sessions, May, 1841, and removed by certiorari at the instance of the defendants.

First count. That Thomas Kenrick the elder, late of, &c., "horsedealer, and Thomas Kenrick the younger, late of," &c., horsedealer, being

evil disposed persons, and seeking to get their living by various subtle, fraudulent and dishonest practices, on the 19th day of April in the fourth year," &c., "with force and arms, at," &c., "together with divers other evil disposed persons, unlawfully, fraudulently and deceitfully did combine, conspire, confederate and agree together, by divers false pretences and subtle means and devices to obtain and acquire to themselves, of and from one George William Featherstonhaugh, divers large sums of money of the moneys of the said G. W. F., and to cheat and defraud him thereof, to the great damage of the said G. W. F., to the evil example," &c., "and against the peace," &c.

Second count. Like the first, except that the conspiracy, &c., was alleged to be "to obtain and acquire to the said Thomas Kenrick the elder" (only) of and from the said G. W. F., &c.

\*Third count. Like the second, only substituting Thomas Kenrick the younger for Thomas Kenrick the elder. [\*50

Fourth count. That defendants, on the said 19th day of April in the fourth year," &c., "at," &c., "unlawfully, knowingly and designedly, did falsely pretend to the said G. W. Featherstonhaugh that a certain carriage, to wit a carriage called a phaeton, and a certain mare and a certain gelding, which they the said" defendants "then and there offered for sale to the said G. W. F., had then been the property of a lady then deceased, and were then the property of her sister, and were not then the property of any horsedealer, and were then the property of a private person, and that the said mare and the said gelding were then respectively quiet to ride and drive, and quiet and tractable in every respect. By means of which said false pretences the said" defendants "did then and there unlawfully, knowingly and designedly obtain from the said G. W. F. a certain valuable security, to wit an order for the payment of 168*l.*, with intent then and there to cheat and defraud him the said G. W. F. of the same. Whereas, in truth and in fact, the said carriage, the said mare and the said gelding had not then been the property of a lady then deceased, and were not then the property of her sister; and whereas, in truth and in fact, the said carriage, the said mare and the said gelding were the property of a horsedealer, and whereas, in truth and in fact, the said carriage, the said mare and the said gelding were not then the property of a private person; and whereas, in truth and in fact, the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect; and whereas the said" defendants "then and there well \*knew that the said carriage, the said mare and the said gelding had not then [\*51 been the property of a lady then deceased, and were not then the property of her sister; and also then and there well knew that the same were then the property of a horsedealer, and that the same were not then the property of a private person, and that the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect. To the great damage and deception of the said

G. W. F., to the evil example," &c., "against the form of the statute in such case," &c., "and against the peace" &c.

Fifth count, like the fourth, except that the offering for sale was alleged to have been by Thomas Kenrick the elder only.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1841, it was stated that Kenrick the younger was dead. The trial proceeded against Kenrick the elder; and evidence was given that both the defendants had been parties to the representations stated in the fourth count: that the bargain had been made by Featherstonhaugh in consequence of his belief in the representations: that they were false; and that the horses were vicious. The lord chief justice told the jury that if they believed, upon this evidence, that there had been a concert between the two to effect the deceit, they must find Kenrick the elder guilty. Verdict, guilty.

In Hilary term, 1842, *Byles* obtained a rule for arresting the judgment, on the ground that the indictment was insufficient (for the reason afterwards stated in argument;) or for a venire de novo, or for a new trial, on the grounds of misdirection, and that there had been a \*mistrial  
 \*52] in trying one defendant after the death of the other. As to the last point, he produced an affidavit to the effect that the defendants pleaded to the indictment in Trinity term, 1841, and that the trial took place on 1st December, 1841, when the counsel for the prosecution stated that Kenrick the younger was dead: and it appeared by the affidavit that he died on 1st November, 1841. The record showed that the *distringas juratores* was tested on 2d November, 1841. The associate's endorsement on the jury pannel was "the jurors find the defendant guilty." But in the affidavit it was stated that the jury returned a verdict of guilty against both the defendants on all the counts of the indictment.(a)

In Michaelmas vacation, 1842,(b)

*Thesiger*, showed cause. The fourth and fifth counts do not say to whom the security belonged which was obtained by the false pretences: and this defect appears from *Regina v. Martin*, 8 A. & E. 481,(c) to be fatal at any stage of the prosecution. These counts, therefore, cannot be supported. But the first three counts are good. The objection will be that they are too general: and *Regina v. Peck*, 9 A. & E. 686, will be cited. There the first count of the indictment charged generally a conspiracy to defraud divers liege subjects, who should bargain with defend-  
 \*53] ants for the sale of goods and merchandise, of great quantities of such goods and merchandise, of great value, to wit 2000l.: and

(a) The postea on the nisi prius record stated as follows: "Afterwards, on the day," &c., "come as well the within named Peregrine Dealty," &c., (coroner,) "as the within named Thomas Kenrick the elder," without mention of the other defendant. And the finding entered was, "that the said Thomas Kenrick the elder is guilty of the premises in the indictment," &c., also without mention of the other defendant.

(b) November 26th. Before Lord Denman, C. J., Coleridge, and Wightman, Js.

(c) And see *Regina v. Parker*, 3 Q. B. 292.

it seems that it would have been good, if it had stopped there: but it added "without making payment or other remuneration or satisfaction for the same," with intent to obtain money, &c.: and this explained the charge to be the conspiring to obtain goods without paying for them; which the court held not to be necessarily a fraud. The second count charged a conspiracy to defraud creditors of the defendants of their debts, and that, in pursuance of the conspiracy, they executed "a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and good will," "for divers false and fraudulent considerations:" and the court held this bad, because it was not shown how the deed was false and fraudulent.<sup>(a)</sup> If, therefore, the second count there had, like the counts now in question, simply charged the conspiracy, without stating what was done in pursuance of it, the objection to it could not have been sustained. This is clear from *Rex v. Gill*, 2 B. & Ald. 204, where the indictment was as general as here, and was held good; Lord TENTERDEN saying that there might be a conspiracy to defraud, though the conspirators had not fixed on the particular means. That decision is, in effect, confirmed by *Rex v. Richardson*, 1 Moo. & Rob. 402. There the indictment charged a conspiracy to defraud H. B. "of the fruits and advantages of the said verdict and certificate;" and Lord DENMAN, C. J., held it bad, distinguishing the form used from that in *Rex v. Gill*, 2 B. & Ald. 204, in which "an offence at common law is clearly and distinctly stated, not in figurative \*and doubtful terms, but in words to which the law assigns a specific meaning." In [<sup>\*54</sup> *Rex v. Eccles*,<sup>(b)</sup> an indictment was held good which charged a conspiracy "by indirect means to prevent one H. B. from exercising the trade of a tailor." No hardship can arise from this state of the law: particulars may always be obtained on application to a judge; *Rex v. Hamilton*, 7 C. & P. 448, is an instance. It is true that there may be false affirmations without an indictable crime; *Rex v. Codrington*, 1 C. & P. 661; *Rex v. Wheatly*, 2 Bur. 1125; *Rex v. Reed*, 7 C. & P. 848. It may follow that a general allegation of false pretences is bad: but the same principle does not apply to a charge of conspiracy to carry into effect false pretences. *Rex v. Pywell*, 1 Stark. N. P. C. 402, was indeed an indictment for conspiring to cheat by selling an unsound horse: but the defendants were there acquitted because the proof of the conspiracy failed: and Lord ELLENBOROUGH said "that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud."

The death of Kenrick the younger, before the trial, did not make it a mistrial: if two defendants are indicted and only one comes in, he must be tried. It is as if one only were indicted for conspiring with persons un-

(a) See *Regina v. Wickham*, 10 A. & E. 34.

(b) Note (d) to *Rex v. Turner*, 13 East, 230; S. C. note (a) to *Winsmore v. Greenbank*, Willes, 583; 1 Leach, C. L. 274, (4th ed.) more fully. See 13 East, 231.

known. [Lord DENMAN, C. J., mentioned *Rez v. Cohen*, 1 Stark. N. P. C. 511.] There it was held that perjury could not be assigned upon evidence given on the trial of a civil cause, in which one of two co-plaintiffs had died between issue joined and trial, and his death had not been

\*55] \*suggested under stat. 8 & 9 W. 3, c. 11, s. 7. The civil action had abated; and the trial was therefore extrajudicial. In *Regina v. Millett*, (a) one of two defendants indicted for conspiracy had died: but Lord DENMAN, C. J., directed the survivor to be tried; and he was convicted. Besides, the surviving defendant here, who removed the record by certiorari, might himself have entered a suggestion, if that was proper. The answer offered on the motion for this rule was, that he did attempt to do so, but was told at the crown office that there was no precedent for such a suggestion. If so, it must be inferred that no suggestion is necessary. There is no analogy between this and civil cases. Before stat. 8 & 9 W. 3, c. 11, the death of either a co-plaintiff or a co-defendant abated the suit, if it was in contract; but not if it was in tort. The inference would be that the death of a co-defendant in an indictment, which is more analogous to tort than to contract, does not abate the indictment. Stat. 8 & 9 W. 3, c. 11, s. 7, allows a suggestion, in case of the death of either a co-plaintiff or a co-defendant, if the cause of action would survive respectively to or against the survivors. In 2 Tidd's Practice, 725, (9th ed.,) the rule is stated as follows. "And when \*there are several  
\*56] plaintiffs and defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but otherwise it need not be suggested, till the judgment roll is made up." The law before the statute appears in Trials per Pais, p. 67, (8th ed.) "After issue joined by two defendants, if one of them die, and then a *venire facias* is awarded betwixt the plaintiff and both the defendants, and so in the *habeas corpora* and *distringas*, yet this shall not vitiate the *venire facias*, &c., to make error; because, though one of the defendants be dead, yet the other being alive, it is sufficient. And there needs to be no surmise in judicial writs, that one of the defendants is dead; it is time to show it to the court at the day in bank." In *Piffin v. Fenton*, Cro. Car. 426, error was assigned on the ground that after issue joined, and before the issuing of the *venire*, one of two defendants died: the *venire*, *habeas corpora* and issue found appeared all to be in a cause be-

(a) The following is from Mr. Robinson's note. "Sittings in Middlesex, after Michaelmas, 3 Vict., before Lord Denman, C. J. *Regina v. Millett and Gregory*. Indictment for a conspiracy. On the case being called on, an affidavit was produced of the death of the defendant Millett, his bail being afraid that, if he was convicted by verdict, they would be liable to pay the prosecutor's costs, under stat. 5 & 6 W. & M. c. 11, s. 3. and the lord chief justice was asked to discharge the recognisance of his bail. His lordship thought he had no authority at nisi prius to make such an order, but said that he would direct the jury not to find a verdict against the accused.

"The *postea* was endorsed: 'The jurors find defendant William Gregory guilty.' The recognisance of the deceased defendant was afterwards discharged; and the defendant Gregory was sentenced."

tween the plaintiff and both defendants: it was surmised that the death was before judgment: but the surviving defendant urged that the plaintiff should "have surmised it before the issue tried." The court, however, held "that such surmise needs not to be in judicial process to alter it: and therefore although a venire facias issued against a dead person, yet one of the defendants being alive, is sufficient, and no cause of error." In the present case the venire was before the death. If a suggestion were necessary at all, it might be made now; *Rex v. Hryes*, 2 Str. 843. In *Thody's Case*, 1 Vent. 234, three were indicted for a conspiracy: one only pleaded and was found guilty: HALE \*said, "If one be acquitted in an action of conspiracy, the other cannot be guilty: [\*57 but where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other." In *Rex v. Niccolls*, 2 Stra. 1227, (a) the defendant was indicted for conspiracy with E. B., and came in alone and pleaded not guilty: the jury found Niccolls guilty, but that B. had died before the indictment was preferred: and the conviction was held good. *Rex v. Cooke*, 5 B. & C. 538, is an exceedingly strong case; there one conspirator was convicted when the other had not yet pleaded.

*Erlz*, contra. As to the form of the indictment, *Rex v. Gill*, 2 B. & Ald. 204, cannot be considered a safe authority since the decision of *Regina v. Peck*, 9 A. & E. 686, where the indictment, though it contained the same substantial allegations with that in *Rex v. Gill*, 2 B. & Ald. 204, was held bad *Rex v. Richardson*, 1 Moo. & Rob. 402, has not been satisfactorily distinguished. The indictment here does not identify the offence: it is as if a justification in an action of slander merely charged the imputed conduct in general words. *Regina v. Rowed*, 3 Q. B. 180, shows the necessity of describing the offence with particularity. At any rate there must be a new trial. The jury were told that the transaction proved was one for which a single defendant would be indictable. But nothing was proved except a warranty, which was indeed false, and must now be assumed to \*have [\*58 been wilfully so. That is not a ground of indictment: it is not quite clear that the breach of the warranty even avoid the contract of sale; *Street v. Blay*, 2 B. & Ad. 456. But a mere wilfully false affirmation on the making of a contract is not an indictable false pretence; *Rex v. Reed*, 7 C. & P. 848. In *Rex v. Pywell*, 1 Stark. N. P. C. 402, Lord ELLENBOROUGH was clearly of opinion that the mere giving a warranty known to be false made the party liable to a civil proceeding only. So it is not a false pretence to obtain money by selling an estate which the occupier has previously parted with; *Rex v. Codrington*, 1 C. & P. 661. Parties cannot be indicted for conspiring to commit a trespass; *Rex v. Turner*, 13 East, 228.

On the point of mistrial, there is no direct authority for the defendant: but a substantial injustice would be done if the party who survives could

(a) S. C. note (a) to *Rex v. The Inhabitants of Oxfordshire*, 13 East, 412.

be tried on an indictment for conspiring with a co-defendant who is dead. The words and acts of the deceased defendant will be evidence against the survivor, who will have lost the means of obtaining explanations of such words and acts. [WIGHTMAN, J. Suppose the other defendant were not dead, but out of the way. Lord DENMAN, C. J. Or not indicted at all. COLERIDGE, J. I do not see how the injustice, if there be one, could be cured by a suggestion.] The issue on the record, whether the two are guilty or not guilty, has not been tried: the proper course is for the judge to refuse to try any question but that which is on the record, as was done in *Ellison v. Isles*, 11 A. & E. 665, 667.

\*59] \**Thesiger* in reply. The argument on the other side impeaches the decision in *Rex v. Gill*, 2 B. & Ald. 204, on the ground that the indictment there did not give specific information enough as to the offence charged. The language of DE GREY, C. J., in *Rex v. Horne*, 2 Cowp. 672, 682, shows what degree of certainty the law requires. "The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes." [Lord DENMAN, C. J. In *Rex v. Gill*, 2 B. & Ald. 204, the indictment charged a conspiracy to "cheat and defraud." Those are words known to the law. Here the charge is a conspiracy to obtain by false pretences: if therefore the proof did not establish that what the conspiracy aimed at was legally a false pretence, there has been a misdirection.] The false pretence was shown. It was actually made antecedently to any contract of sale, though followed by a contract. The liability to a civil action, if it exist, does not exclude the liability to indictment. It is said that the remedy is an action on the contract. But the civil action would be on the false representation, as in *Dobell v. Stevens*, 3 B. & C. 623: a conspiracy to make that representation is indictable. In *Rex v. Turner*, 13 East, 228, Lord ELLENBOROUGH held that it was not a conspiracy to agree to sport on another man's ground: but a conspiracy to destroy the game there, or to drive the prosecutor from his own ground

\*60] would have been indictable. No \*authority which has been cited shows that the representation here was not technically a false pretence. In *Rex v. Reed*, 7 C. & P. 848, there was no allegation of guilty knowledge as to any part of the actual offence: and knowledge and fraudulent intent are necessary. But, where they exist, any method of making the pretence is sufficient; *Rex v. Barnard*, 7 C. & P. 784.(a) *Rex v. Codrington*, 1 C. & P. 661, must have been decided on the ground that the representation was a constituent part of the contract itself, and nothing more: if it cannot be so explained, the decision seems very questionable. Here the representation is a distinct act. No injustice has been done by

(a) See judgment of Buller, J., in *Young v. The King*, 3 T. R. 98, 104.

the trial of one defendant after the death of the other; for the jury were told that they could not convict one unless they held that both had joined in the offence. Nor was it technically a mistrial. (On this point he was stopped by the court.) *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 24th,) delivered the judgment of the court.

This was an indictment for a conspiracy, containing five counts. Of these two(a) were given up by the counsel for the prosecution, on account of an objection wholly unconnected with that made to the others now to be considered. The third ran in the following form. (His lordship then read the third count.) The fourth and fifth charged the defendants with obtaining money by false pretences, which were set forth.

It was contended, in the first place, that the third \*count was bad by reason of uncertainty, as giving no notice of the offence charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question: for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offence so called. The offence has been held to consist in the conspiracy, and not in the facts committed for carrying it into effect: and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose. [\*61]

This form of indictment was formally questioned in *Rex v. Gill*, 2 B. & Ald. 204, and was, upon discussion, held good; nor has that decision been overruled. The indictment in *Rex v. Eccles*,(b) stated in a note there, is equally general.

There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation: and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place; and the expedient now employed in practice, of furnishing defendants with a particular of the acts charged upon \*them, is probably effectual for preventing surprise and unfair [\*62] advantages.

Doubts have also been expressed how far an indictment for conspiracy may be maintained where the object of it was of a very trivial nature, or where the whole matter might be thought to sound in damage, not in crime. Lord ELLENBOROUGH, in *Rex v. Turner*, 13 East, 228, would not permit parties to be convicted of a conspiracy for effecting so slight an

(a) The fourth and fifth; see p. 52, ante.

(b) Note (d) to *Rex v. Turner*, 13 East, 230; S. C. note (a) to *Winsmore v. Greenbank*, Willes, 583; 1 Leach, C. L. 274, (4th ed.)

object as a trespass by following the game on another's land. The same learned judge, in *Rex v. Pywell*, 1 Stark. N. P. C. 402, stopped the case on the trial of an indictment for a conspiracy, where the fraud to be accomplished appeared to be such as would more properly be the foundation of a civil action on the warranty of a horse. But, if, in the case of *Rex v. Turner*, 13 East, 228, the meditated injury, instead of ending with a trespass, had been planned for the purpose of seizing the landowner, or driving him from the country, we have no reason to think that the learned judge would have condemned an indictment for a conspiracy to effect that object. In the case of *Rex v. Pywell*, 1 Stark. N. P. C. 402, the acquittal was directed, not because an action might have been brought on a warranty, but because one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised. His lordship said "that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud." Lord TENTERDEN also is supposed to have thrown some doubt on the common form of indictment for conspiracy in *Rex v. Fowle*, 4 C. & P. 592 :  
 \*63] but the indictment there departed from the common form, "charging a conspiracy "to cheat and defraud the just and lawful creditors" of F., but not saying "of their moneys," or of any thing. This objection could not have escaped that learned judge, though two others only, and those less weighty, are ascribed to him by the reporter: that it does not state what was to be done, or who was to be defrauded. Even that indictment, however, he permitted to be tried; and the defendants were acquitted for want of evidence. If they had been convicted, and the judgment arrested, the case of *Rex v. Gill*, 2 B. & Ald. 204, would have remained untouched. Nor does Lord TENTERDEN say any thing which indicates his dissatisfaction with it. The indictments in *Rex v. Richardson*, 1 Moo. & Rob. 402, and *Regina v. Peck*, 9 A. & E. 686, which were held bad, were satisfactorily distinguished in the argument from that in *Rex v. Gill*, 2 B. & Ald. 204.

The case was moved and argued for misdirection, as well as in arrest of judgment, inasmuch as the jury, it was said, ought to have been told that the evidence established no indictable offence. But this objection is, in fact, the same as that already stated, on which we have observed. The third count charged a conspiracy to cheat the prosecutor of his moneys in general terms. The evidence was, in effect, that the prosecutor was told by both defendants that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horsedealer, and that they were quiet and tractable, all these statements being absolutely false, and the defendants knowing that nothing but a full belief of their truth would have induced the prosecutor to make the purchase, as he \*repeatedly informed them that  
 \*64] he wanted the horses for his daughter's use. The conspiracy was made out to the entire satisfaction of the jury; and its object was, not to

do any thing innocent, lawful or indifferent, but to cheat the prosecutor of his money by false representations.

The fourth and fifth counts charged directly the obtaining of the money by false pretences. The evidence was that the defendants, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses sold, and thereby induced him to buy and part with the price.

A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be sustained. Questions approaching this have been raised in the criminal courts. With some plausibility, the thing obtained through the false pretence may be said to be the contract and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay. This was the ground on which my brother LITTLEDALE directed an acquittal in *Rex v. Codrington*, 1 C. & P. 661. But that decision was lately much doubted by the judges with reference to a case reserved by the recorder of London.<sup>(a)</sup> A person who falsely pretended that he was an emigration commissioner thereby induced the prosecutor to enter into contract with him, and to pay him under it a sum of money. An objection was taken that the verbal representations could not be received in evidence, as the bargain between them was reduced to writing. But the \*recorder admitted the evidence: and the judges unanimously approved of his decision; and the conviction was held good. Hence it follows that the execution of a contract between the same parties does not secure from punishment the obtaining of money under false pretences in conformity with that contract. Generally speaking, indeed, there would be little satisfaction in suing parties guilty of such proceeding. But, in the greater number of such cases, it is more probable that a contract should intervene in the transaction than otherwise. Though many breaches of contract may be of such a nature as to be the subject of an action and not of any criminal proceeding, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud.

We think that, in this case, the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false; and the money was obtained by their means. These counts therefore are good.<sup>(b)</sup> Rule discharged.

(a) *Regina v. Adamson*, 2 Moo. C. C. 286, seems to be the case referred to. See *Rex v. Crossley*, 2 Moo. & Robb. 17.

(b) For the ground on which these counts were abandoned on the part of the prosecution, and which does not affect the principle of the above decision, see p. 52, ante.

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The QUEEN v. The Inhabitants of EVENWOOD and BARONY.

Reported, 3 Q. B. 370.

MILWARD v. HIBBERT.

(Motion to add plea.)

Reported, 3 Q. B. 141, note.(b)

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\*66] \*The QUEEN v. The Churchwardens and Overseers of the Poor of the Parish of CHELMSFORD.

A superintendent constable, appointed for a division comprehending the parish of C., under stats. 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, expended money in fees to the justices' clerk in respect of vagrants apprehended in the parish of C. The parish, for many years before those statutes passed, had defrayed such expenses when incurred by the parish constables.

*Held*, that the parish was liable for the expenses, inasmuch as stat. 2 & 3 Vict. c. 93, s. 8, puts such constables in the situation of parish constables, and therefore authority might be inferred, from the previous conduct of the parish, to make the disbursements in question.

And that these were not to be deemed extraordinary expenses, within the meaning of stat. 2 & 3 Vict. c. 93, s. 18, so as to be payable by the division under stat. 3 & 4 Vict. c. 88

On appeal against an order of two justices, allowing the accounts of John May, the sessions confirmed the order, subject to the following case.

The appellants were the churchwardens and overseers of the poor of the parish of Chelmsford, within the Chelmsford division of the county of Essex. The respondent was a superintendent of the Essex constabulary force, appointed for and acting within the Chelmsford division, having been appointed such, pursuant to stat. 2 & 3 Vict. c. 93, (amended by stat. 3 & 4 Vict. c. 88,) by the county justices at quarter sessions, and by them sworn in as constable. The account in question was as follows.

"The account of John May, superintendent constable, appointed for the several parishes within the division of Chelmsford, in the county of Essex, under the authority of 2 & 3 Vict. c. 93, of all sums expended by him on account of the parish of Chelmsford, within his said division, for the three months ending 30th June, 1842, kept pursuant to 18 G. 3, c. 19, s. 4.

"John May, Superintendent.

"1842. Paid justices' clerk fees for proceedings against the following vagrants.

"April 1. Richard Waring, a vagrant, 7s."

\* (Then followed the names of other vagrants.)

\*67]

"William Hunting, a drunkard, 7s. 6d."

(Then followed the names of other drunkards.)

The whole sum amounted to 7l. 14s. 6d.: and the account allowed for 1l. 10s., received for fines of persons convicted of drunkenness, leaving a balance of 6l. 4s. 6d. in favour of May.

The above account was, on 7th July, 1842, delivered to the overseers of the parish of Chelmsford, and by them laid before the inhabitants of

the said parish, at a vestry meeting held on the same day; and was by the said inhabitants disallowed.

John May, then, in pursuance of stat. 18 G. 3, c. 19, produced the book containing the said account before two of her majesty's justices of the peace in and for the said county and division, giving reasonable notice to the overseers of the poor of the parish of Chelmsford for the time being: which said justices, then, after examining the same, settled the sum which to them appeared due on the said account, and signed their names thereto, and then subscribed thereto the following order or certificate.

"We, two of her majesty's justices of the peace for the county of Essex, acting in and for the division of Chelmsford, having examined the above account, which has this day been laid before us by the above named John May, do hereby certify that we have heard and determined the objection made thereto by the inhabitants of Chelmsford, and have settled the amount due thereon to the said John May at the sum of 6*l.* 4*s.* 6*d.*"

(Signed by the two Justices.)

The notice and grounds of appeal were as follows.

"Take notice, that we, the churchwardens and overseers of the poor of the parish of Chelmsford, in the \*county of Essex, finding that the said parish is aggrieved by the determination of," &c., (the two justices,) [\*68] "by which was allowed a certain account of John May, superintendent constable appointed for the several parishes within the division of Chelmsford for the county of Essex, under the authority of a certain act," &c., (2 & 3 Vict. c. 93,) "of all sums alleged by him to have been expended on account of the said parish of Chelmsford, within his said division, for the three months ending 30th of June last past, kept pursuant to an act," &c., (18 G. 3, c. 19,) "whereby we, the said overseers, under the said last mentioned act, became liable to pay the same, and which said account was on the 7th day of July last past delivered to us, the overseers of the said parish, and by us laid before the inhabitants of the said parish at a vestry meeting holden on the same day, and by the said inhabitants wholly disallowed; do intend," &c., (to appeal to the next general sessions against the allowance;) "and we do further give you notice that the causes of such appeal are, that the sums contained in the said account of the said John May were not expended by him in doing the business of the said parish; and that they are expenses provided for by the said act of parliament under the authority of which the said John May was appointed as aforesaid, and by a certain other act of parliament, passed," &c., (3 & 4 Vict. c. 88;) "and, lastly, that the said overseers are not liable in law to the payment of the said account." Dated, &c. Addressed to the two justices, their clerk, and John May. Signed by the churchwardens and overseers of Chelmsford.

For many years prior to the passing of stat. 2 & 3 Vict. c. 93, similar accounts had been charged upon \*and paid by the parish officers of Chelmsford, out of their poor-rates; but, during that time, such [\*69]

persons had been proceeded against, and such expenses incurred, by parish constables appointed under the then existing laws. The question for the opinion of the court (reference being had to the statutes 13 & 14 C. 2, c. 12; 18 G. 3, c. 19; 1 G. 4, c. 37; 3 G. 4, c. 40; 5 G. 4, c. 83; 1 & 2 W. 4, c. 41; 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88) was, whether the churchwardens and overseers of the poor of the parish of Chelmsford were liable to pay the account in question out of the rates by them collected for the relief of the poor of that parish.

In last Easter term,(a)

*Edwin James* and *T. C. Marsh* were heard in support of the order of sessions, and *Kelly, Ryland* and *Waddington* against it. The course of argument appears fully from the judgment. *Cur. adv. vult.*

LORD DENMAN, C. J., in this vacation, (June 29th,) delivered the judgment of the court.

This was an appeal against the order of two justices, under stat. 18 G. 3, c. 19, s. 4, allowing one John May the sum of 6*l.* 4*s.* 6*d.*, expended by him as constable in doing the business of the parish of Chelmsford, as he alleged.

May was a superintendent constable under the statutes 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88: and the sums in question had been paid by him  
 \*70] for the fees of \*the justices' clerks in respect of proceedings against vagrants apprehended in the parish of Chelmsford. May was superintendent for a division comprehending several other parishes, as well as that of Chelmsford.

The eighth section of stat. 2 & 3 Vict. c. 93, in effect puts the constables appointed under that act in the same position as parish constables. It is stated in the case that sums so expended had always been allowed to the parish constables prior to stat. 2 & 3 Vict. c. 93: and we are of opinion that such statement is sufficient to show a general authority from the parish officers to the constables to make such necessary disbursements.

But it is contended, for the parish, that these payments come within the eighteenth section of stat. 2 & 3 Vict. c. 93, which provides for allowances to constables under that act for *extraordinary expenses* in execution of their duties beyond their fees and salaries; which allowances, by stat. 3 & 4 Vict. c. 88,(b) are to be paid by the division. We are of opinion that these sums are not extraordinary expenses, within that section, but are the common and ordinary disbursements necessary for relieving the parish from the burden of vagrants, whom the constables are bound by several provisions of the vagrant acts to apprehend themselves, or to receive and take charge of when apprehended by others; expenses, therefore, which the constables cannot avoid. They are manifestly incurred on behalf, and for the benefit, of the *parish*, and in doing the business of the parish, not of the division: and this is an unworthy attempt by the parish officers of

(a) May 3d, 1843. Before Lord Denman, C. J., Patteson, and Williams, Js.

(b) See sects. 3, 5, 29.

Chelmsford to shift from themselves an expense, which properly belongs to \*them on behalf of their parish, upon other parishes included in the division, who have nothing at all to do with it. [\*71

The cases cited, viz. *Rex v. Bird*, 2 B. & Ald. 522, and *Rex v. Seville*, 5 B. & Ald. 180, are entirely distinguishable. They were cases of expenses incurred voluntarily, and not in doing the business of the parish, as these are.

For these reasons we are of opinion that the order of the court of quarter sessions should be confirmed. Order of sessions confirmed.

### The QUEEN v. The Churchwardens and Overseers of ARDSLEY.

Under stats. 4 & 5 W. 4, c. 76, s. 73, and 2 & 3 Vict. c. 85, s. 1, the quarter sessions of the west riding of Yorkshire made an order, reciting that the parish officers of a township in that riding had applied at petty sessions for an order of maintenance, and that the party against whom the application was made had declared himself desirous that the charge should be determined at quarter sessions; and adjudging that the application should be dismissed, and the parish officers pay the costs of opposing it.

1. *Held* to be no objection to the order, that it did not appear when the child was born.
2. Admitted that, as against the parish officers, it must be intended that the township supported its own poor.
3. *Held*, that the parish officers could not object that the township might be part of a union, and that the guardians, if so, were the proper parties to the proceeding; first *semble*, because the parish officers, who were the applicants for the order of maintenance, must be presumed to know the fact; secondly, at any rate, because, in the absence of any allegation, it could not be presumed that there was a union comprehending the township.
4. and 5. The order of quarter sessions stated that the township above mentioned was situate within the division of S., in the west riding; that at the petty sessions holden at Barnsley, in and for the said division of S., the application was made to the justices of the peace holding such petty sessions: that the said justices adjourned the hearing to a certain day: and that, on such day, the party appeared before the justices in petty sessions holden at Barnsley aforesaid, and declared, &c. *Held*, that it sufficiently appeared that the justices at petty sessions were justices of the west riding, and that Barnsley, to which they had adjourned, was within the west riding.
6. The order did not show that any application had been made for the costs. *Held* no objection, inasmuch as it appeared that the parish officers had applied for the order of maintenance.

PASHLEY, in last term, obtained a rule nisi for quashing the following order, which had been brought up by certiorari.

\*West Riding of Yorkshire to wit. Be it remembered that, at the Midsummer general quarter sessions of the peace of our lady the queen, holden at Skipton, in and for the west riding of the county of York, on Tuesday the 29th day of June, in the fifth year of the reign, &c., A. D. 1841, before Matthew Wilson, Esq., chairman, Anthony Marsden, clerk, and others their fellows, justices of our said lady the queen aforesaid, to keep the peace of our said lady the queen, in the said riding, and also to hear and determine divers felonies, tres- [\*72

passes and other misdemeanors committed within the riding aforesaid, that same sessions of the peace is adjourned by the justices aforesaid until Wednesday the 30th day of June in the year aforesaid, at ten of the clock in the forenoon of the same day, to be holden at Bradford in and for the riding aforesaid, to do further as the court there shall consider, and so forth: and on the said Wednesday the 30th day of June aforesaid, in the year aforesaid, the same general quarter sessions of the peace is holden, by the adjournment aforesaid, at Bradford aforesaid, in and for the said Riding, before John Beswicke Greenwood, Esq., chairman, Ellis Cunliffe Lister, Esq., and others their fellows, justices of our said lady the queen, assigned to keep the peace, &c., (as before,) and also to hear and determine, &c., (as before :) at which said general quarter sessions of the peace, continued and holden by the adjournment aforesaid, at Bradford aforesaid, in and for the said riding, on the said Wednesday the 30th day of June aforesaid, in the year aforesaid, before the justices last named, that same sessions of the peace is further adjourned by the justices last named until Monday the 5th of July in the year aforesaid, at eleven of the clock in the \*forenoon of the same day, to be holden at Rotherham, in and

\*73] for the riding aforesaid, to do further as the court there shall consider, and so forth: and on the said Monday the 5th day of July aforesaid, in the year aforesaid, the same general quarter sessions of the peace is holden, by the adjournment last mentioned, at Rotherham aforesaid, in and for the said riding, before William Alderson, clerk, chairman, Henry Bowen Cooke, clerk, and others their fellows, justices of our said lady the queen assigned to keep the peace, &c., (as before,) and also to hear and determine, &c. (as before.) At which said general quarter sessions of the peace, continued and holden, by the adjournment last mentioned, at Rotherham aforesaid, in and for the said riding, on the said Monday the 5th day of July aforesaid, in the year aforesaid, before the justices last named: Whereas it appears to the court here that the township of Ardsley, in the west riding of the county of York, is situate within the division of Staincross in the said west riding, and that, at a petty sessions holden at Barnsley, in and for the said division of Staincross, on the 28th day of April last, the churchwardens and overseers of the poor of the said township of Ardsley did make application to the justices of the peace holding such petty sessions for an order upon Matthew Hirst of Barugh in the said riding, farmer, whom the said churchwardens and overseers of the poor then and there charged with being the putative father of a male bastard child, born of the body of Frances Rolling, single woman (which said child, by reason of the inability of the said mother to provide for its maintenance, had become chargeable to the said township of Ardsley within three calendar

\*74] months before the making of such \*application,) to reimburse the said township of Ardsley for the maintenance and support of the said male bastard child; and whereas it further appears to the court here that due notice of the intention of the said churchwardens and overseers

of the poor of the said township to make the said application was given by the said churchwardens and overseers of the poor of the said township to the said Matthew Hirst seven days before the holding of the said petty sessions; and whereas it further appears to the court here that the said justices did adjourn the hearing of the said application, on account of the illness of the said Matthew Hirst, to the 12th of May last, and that, on the last mentioned day, the said justices did further adjourn the hearing of the said application on account of the continued illness of the said Matthew Hirst to the 26th day of May last: and whereas it further appears to the court here that, on the same 26th day of May last, the said Matthew Hirst did appear before the justices in petty sessions holden at Barnsley aforesaid on the said last-mentioned day, and did declare to the same justices that he was desirous that the charge should be heard and determined at the quarter sessions of the peace to be holden in and for the said west riding, and did then and there enter into a cognisance, with two sufficient sureties, conditioned personally to appear at the quarter sessions of the peace then next ensuing, namely, at these sessions now held by adjournment at Rotherham aforesaid, to answer the said charge, and to abide the judgment of the court of such sessions, and to pay all the costs incurred by the said churchwardens and overseers of the poor of the said township in bringing such charge before this court of quarter sessions in case the court should adjudge him \*to be the putative father of such child; which said recognisance is produced in court here; and whereas it further appears to the court here that no application has been made with respect to the said bastard child to any court of general quarter sessions under the provision of an act, &c., (4 & 5 W. 4, c. 76;) and whereas the said churchwardens and overseers of the poor of the said township of Ardsley now make application to the court here for an order upon the said Mathew Hirst to reimburse the said township of Ardsley for the maintenance and support of the said male bastard child; and, on the hearing of such application, it appears to the court here that no order shall be made upon the said Matthew Hirst, and that the said application shall be dismissed, and that the said churchwardens and overseers of the poor shall pay to the said Matthew Hirst his costs and charges in opposing the said application: It is therefore adjudged by the court here that the said application be dismissed, and that the churchwardens and overseers of the poor of the said township of Ardsley do, on notice of this order, pay or cause to be paid to the said Matthew Hirst the sum of 14*l.* 4*s.* 6*d.* for his costs and charges incurred in opposing the said application. [\*75]

Sir *G. A. Lewin*, in last term, showed cause.(a) The objections to this order will be the following. 1. That it \*does not state that the child was born before the passing of stat 4 & 5 W. 4, c. 76. [\*76]

(a) June 16th. Before Lord Denman, C. J., Williams, and Coleridge, Js. Patteson, J., had left the court.

The following list of objections was handed to the court.

That is immaterial to the jurisdiction. The parish officers have set the proceeding on foot, and are not entitled to resist the payment of costs on the ground that the facts do not warrant the course they have taken. 2. That it does not appear that the township of Ardsley supports its own poor. But the application is made by parties assuming to be the overseers of the poor of the township; and they cannot be allowed to dispute the facts essential to that character. 3. That it does not appear but that the township is within a union, in which case the proper parties to make the application would be the guardians. That objection is open to the same answer as the preceding. And, further, in the absence of any statement on the subject, it will not be presumed that a union was created. 4. \*77] and 5. That it \*does not appear that the proceedings at petty sessions were within the west riding, nor that the justices before whom those proceedings were instituted were justices of the west riding. That is a mere misprision of the officer who drew up the order from the minute: such an order of petty sessions indeed is usually not drawn up at all; and the clerk to the justices might have returned that usage to a certiorari.

*Pashley*, contra. 1. If the child was not born since stat. 4 & 5 W. 4, c. 76, came into operation, the quarter sessions had no power, by stat. 2 & 3 Vict. c. 85, to make this order. A question something like this arose in *Unwin v. St. Quintin*, 11 M. & W. 277, on stat. 2 & 3 Vict. c. 29, but was not expressly decided upon. That the order must show all points raising the jurisdiction appears from *Regina v. The Justices of Hampshire*, 9 Dowl. P. C. 171; *Regina v. The Guardians of Hartley Wintney Union*, 1 Q. B. 677; *Regina v. The Guardians of The Huddersfield Union*.(a) 2.

1. That it does not appear by the order that the bastard therein named was born since the passing of stat. 4 & 5 W. 4, c. 76.

2. That it does not appear by the order that the township of Ardsley is a parish within stat. 2 & 3 Vict. c. 85.

3. That, by stat. 2 & 3 Vict. c. 85, the authority to apply for such order is, in the first instance, given to the guardians of the parish, or of the union in which such parish may be situate, and to the overseers only if there be no such guardians; and that the present order is therefore bad for not showing that there were no such guardians of the township of Ardsley, and that that township was not situate in a union.

4. That it does not appear by the said order where the justices, who are said on the 12th of May to have adjourned "the said application" to the 26th of May, were assembled on the said 12th of May when they so adjourned the same; and that it does not even appear by the said order in what county or riding the said justices so on the 12th of May adjourned the said application.

5. That the petty sessions, stated in the order to have been holden at Barnsley on the 26th day of May, do not appear to have been so holden in pursuance of any previous adjournment; that they do not appear to have been so holden either in the division of Staincross, or in the west riding of Yorkshire; that it does not appear before what justices, whether justices of the peace or otherwise, the same were so holden; and that it does not appear that any one then and there made any application whatever for any order on the said Matthew Hirst.

(a) In this case a rule for quashing an order was made absolute in last Easter term, (April 26th, before Lord Denman, C. J., Patteson, and Williams, Js.) on the ground that

The next objection may perhaps be answered by the fact of the application being made by the officers of Ardsley, and is therefore not pressed. 3. If the parish officers of Ardsley were not the proper parties to the application, this is, in effect, an order against strangers, which the sessions had no power to make. 4 & 5. The next objections go at once to the jurisdiction. Every thing ought to appear which is necessary to authorize the proceedings at petty sessions; for, if they were coram non judice, the quarter sessions had no jurisdiction; *St. Nicholas v. St. Helens*, 2 Salk. 472; *Brook v. Jenney*, 2 Q. B. 265; (a) *Stowel v. Lord Zouch*, Plowd. 353, 376; *Regina v. Wymondham*, 2 Q. B. 541; *Regina v. Sherburn*, 2 Q. B. 545, note (a). *Regina v. The Guardians of the Huddersfield Union*, ante, p. 77, note (a), also supports this objection. The justices at petty sessions do not appear distinctly to have even acted in the west riding: indeed it does not appear at all that they were justices of the riding; no jurisdiction therefore is shown; *Regina v. Uplin*, Ca. Sett. & Rem. 19; *Rex v. Oulton*, 2 Sess. Ca. 73; *Rex v. Dobbyn*, 2 Salk. 474. The adjournment of the petty sessions is not shown to have been made to a place within the district in which the justices of the petty sessions had jurisdiction. It is true that, where jurisdiction once appears, presumptions will be made in favour of the correctness of the proceedings. But such presumptions are not admissible for the purpose of showing jurisdiction; *Rex v. Hulcott*, 6 T. R. 583; *Rex v. All Saints, Southampton*, 7 B. & C. 785, 790; (b) *Regina v. Toke*, 8 A. & E. 227, 233; *Christie v. Umoin*, 11 A. & E. 373; *Rex v. Burridge*, 3 P. W. 439, 496. An objection of this kind is not cured by the appearance of the parties, *Lawrence v. Willcock*, 11 A. & E. 941, and the cases there cited; *Smith v. Brown*, 2 M. & W. 851; *Allen v. Pink*, 4 M. & W. 140; *Edge v. Shaw*, 2 C., M. & R. 415; S. C. 5 Tyrwh. 1127. (c) Cur. adv. vult.

\*Lord DENMAN, C. J., in this vacation, (June 29th,) delivered the judgment of the court. [\*79]

This case comes before us upon a return to a writ of certiorari, whereby a certain order, made by the Court of Quarter Sessions for the west riding of the county of York, is removed into this. By that order it appears that the parties who have sued out the certiorari (the churchwardens and overseers of the township of Ardsley in the said riding) made an application to justices at petty sessions against one Matthew Hirst, the putative father of a bastard child, to compel him to reimburse them certain costs and charges incurred by maintaining the said bastard; that the said M. Hirst was desirous that the charge should be heard at the quarter sessions; and that the case was transferred to such sessions accordingly. Several ad-

the justices making an order at petty sessions in the west riding were not shown by the order to have been justices of the riding. Pickering showed cause; Pashley supported the rule. It has not been thought necessary to report the case.

(a) See *Regina v. Martin*, note (a) to *Taylor v. Clemson*, 2 Q. B. 1037.

(b) See *Taylor v. Clemson*, 2 Q. B. 987, 1036.

(c) See *Regina v. The Justices of Wilts*, 12 A. & E. 702.

· jourments of the said quarter sessions are stated, until the 5th of July, on which day the quarter sessions are stated to have been holden at Rotherham, “in and for the said” west “riding.” It further appears, that, at such sessions, an application was made by the said officers of Ardsley against the said Hirst; and that, upon the hearing thereof, the court adjudged that no order should be made upon the said Hirst, but that the said officers of Ardsley (the then applicants) should pay to the said Hirst a certain sum for his costs and charges.

And to this order, which is fully set out in the return, several objections on behalf of the said officers of Ardsley have been made.

The first in order was that the guardians of the poor, where there are such, are the proper parties to make such an application, and that it ought to have been shown that there are none such for Ardsley, to give authority  
 \*80] \*to the churchwardens and overseers to apply. To this objection, made by the same persons *who applied for the order*, it might, perhaps, be enough to answer that they must be presumed to have been acquainted with the state of the township of which they were the officers, and whether it formed a part of any union or not. But, further, it does not appear on the face of the order that Ardsley was an associated township; and we ought not to make *an inference* that it is, in order to give effect to this objection, supposing it to be well founded.

It was also objected that a certain adjournment of the Court of Quarter Sessions, which is stated to have taken place on the 12th May, 1841, does not appear to have been made by justices of the west riding, or (which is pretty much the same objection put in another shape) that such adjournment was made *in* the said west riding. We think, however, that these things do sufficiently appear. And, first, it may be asked why the language of the order should be tortured for the purpose of giving to it a meaning which would render it doubtful whether certain places therein named, viz. Bradford, Skipton, Rotherham, and Barnsley, are situate in the said west riding or in the counties of Cumberland or Cornwall. But the whole order must be taken together; and Barnsley, when first mentioned, is described as being in the division of Staincross, which division has immediately before been described as being in the west riding. Then, as to the justices, they are described as justices of the peace “holding *such* petty sessions;” and (referring back, as the word “such” requires,) we find the petty sessions to have been “in and for the said division of Staincross,” which, as we have already seen, is itself stated to be in the west riding.

\*81] The holding, therefore, of the \*petty sessions *at* Barnsley on the 12th of May, and the adjournment *from* Barnsley, as is in the order stated, does appear to have been made within the limits of the said west riding, and by justices thereof.

Another objection was that, at the Court of Quarter Sessions awarding costs against the now complaining party, it does not appear that any application of any sort was made to such court by any party. We are not

sure whether this (though certainly one of the written objections furnished to the court) was persisted in on the argument. But, be this as it may, a reference to the order gives an answer to it; for an application by the churchwardens and overseers of the township of Ardsley against the said Hirst is stated, before the adjudication of the Court of Quarter Sessions in his favour and against the parties who now object to the order.

Upon the whole, we are of opinion that the rule must be discharged.

Rule discharged.(a)

(a) See note to this case, p. 163, post.

### HAYES v. CAULFIELD.

In an action against the acceptor of a bill of exchange endorsed by A., the drawer and payee, to B., B. to C., and C. to plaintiff, who appears to be a bona fide holder, the defendant, on a plea that A. did not endorse to B., cannot offer evidence that A. delivered the bill to B. for a specific purpose, and not to be negotiated, and that B. fraudulently negotiated it.

**ASSUMPSIT.** The declaration stated that A. Allison, on, &c., made his bill of exchange, &c., and directed the same to defendant, and thereby required him to pay to the order of the said A. Allison, &c., and defendant accepted the said bill; and the said A. Allison endorsed the same to G. Winch, who endorsed to Lacy, who endorsed to plaintiff: promise by defendant to pay plaintiff, &c.

\*Pleas. 1. That defendant did not accept, &c. 2. That the said A. Allison did not endorse the said bill of exchange to the said G. Winch, in manner and form, &c. 3 and 4. That Winch did not endorse to Lacy, and that Lacy did not endorse to plaintiff, in manner and form, &c. Issues thereon. [\*82]

On the trial, before COLERIDGE, J., at the sittings in Middlesex after Trinity term 1842, the acceptance and the handwriting of the endorsements were proved. There was some evidence that the plaintiff had given value. The defendant's counsel proposed to prove, in support of the second plea, that, although Allison, the payee, had endorsed his name on the bill, he had delivered it to Winch, the second endorser, to be discounted and not to be negotiated, and that Winch had endorsed and transferred it in fraud of Allison; and therefore that, as between Allison and Winch, there had been no endorsement completed by delivery. *Marston v. Allen*, 8 M. & W. 494, was cited. The learned judge rejected the evidence; and a verdict was given for the plaintiff. In Michaelmas term 1842, a rule nisi was obtained for a new trial.

*Bull* now showed cause. It may be admitted that endorsement, in the proper legal sense, requires not merely writing the party's name on the bill, but a valid delivery also. That is the effect of *Marston v. Allen*, 8 M. & W. 494; but here the facts are different. [COLERIDGE, J. There

was nothing to implicate the plaintiff in the misconduct of Winch: that was the difficulty I had in applying the case of *Marston v. Allen*, 8 M. & W. 494.] And there \*was between Winch and the plaintiff an  
 \*83] intermediate party, Lacy, who held bonâ fide. The allegations of endorsement in the declaration were satisfied in the first instance by mere proof of writing the name and delivering the bill. If the defendant wished to show that any one of the alleged endorsements did not operate as such, because the bill was handed over for a specific purpose, and transferred in fraud of that purpose, he should have pleaded specially. *Marston v. Allen*, 8 M. & W. 494, differs from the present case, because there the bill never was in fact delivered to any person as endorsee. It was endorsed in blank, and transferred, for safe custody only, to the person from whom the second endorser received it. The distinction drawn by Lord DENMAN, C. J., in *Adams v. Jones*, 12 A. & E. 455, bears upon this point. "A bill may be endorsed to a party in two ways; either by a special endorsement, making it payable to that party; or by a blank endorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party as endorsee, in order to constitute an endorsement to him." Here it may be taken that the bill was delivered to Winch as endorsee; and if Winch fraudulently endorsed it over (which ought to have been pleaded) the plaintiff was no party to such fraud.

*Knowles*, contra. The declaration alleges that Allison endorsed to Winch; the second plea is, that Allison did not endorse. That called upon the plaintiff to prove, not merely what was proved here, that Allison  
 \*84] wrote his name on the back of the bill and delivered it to \*Winch; as a person might give his servant a bill to be carried to the banker's, but that it was delivered with an intention to pass some interest. *Goggerley v. Cuthbert*, 2 New Rep. 170; *Cranch v. White*, 1 New Ca. 414, and *Brind v. Hampshire*, 1 M. & W. 365; S. C. Tyr. & G. 790, show that a bill delivered over for a specific purpose only is not, in a legal sense, endorsed, though it have a formal endorsement. It is true that the facts in *Marston v. Allen*, 8 M. & W. 494, were different from those of the present action; but the case turned upon the question what was meant by the term "endorsed" in the declaration; and ALDERSON, B., in delivering the judgment of the court, said: "It appears to us that the new rules of pleading have really nothing to do with this question. The only point for us to consider is this—what in point of law is the endorsement of the bill denied by the plea on this record. We have to decide whether, if the facts opened by the defendant had been fully proved, my learned brother ought to have directed the jury that this bill had not been endorsed by John Harrop. If the endorsement denied by this plea simply means the writing of the name of John Harrop on the back of the bill, the plaintiff is right; for these facts have no tendency to disprove that proposition: or, if it means such an act of writing on the bill, followed by the bill being

afterwards *under any circumstances* in the hands of a holder, then also the verdict ought not to be disturbed. But we think neither of these propositions can be sustained in point of law." (*Knowles* then proceeded to argue that the evidence did not show a giving of consideration by the plaintiff.)

\*Lord DEKMAN, C. J. Under the circumstances of this case I think the plaintiff proved as much as he was bound to prove. [85  
The last of several endorsees brings an action on the bill. The defendant pleads that an intermediate party between the plaintiff and the payee "did not endorse." The only meaning that plea can have is to call in question the handwriting of the endorser. If the dispute were between an endorsee and his immediate endorser, it might be expected that, on such a plea, the plaintiff should be prepared for the question whether or not the transfer of the bill was for a purpose consistent with the intention of the prior endorser: but that is not so where the plea goes no farther than to deny the endorsement of an intermediate party. No suspicion is thrown on the plaintiff here; and it seems to me that without question the defendant was liable.

WILLIAMS, J.,(a) concurred.

COLERIDGE, J. There was a *prima facie* case for the plaintiff. The evidence offered would have raised no suspicion as to him; and there was proof, though slight, that he had given consideration. As the proposed evidence would have borne only upon the conduct of a prior party, the case stands clear of the decision in *Marston v. Allen*, 8 M. & W. 494; and, reserving the right, whenever such a question arises, of considering whether all that was said in that case can be sustained, I think the plaintiff here is entitled to retain the verdict. Rule discharged.

(a) Patteson, J., had left the court.

•86]

•IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench)

HALSTEAD v. MARY SKELTON.

Since stat. 1 & 2 G. 4, c. 78, if the drawee of a bill drawn without special direction as to place of payment accepts it, payable at a particular place (without any additional words,) he undertakes thereby to pay the bill at maturity, when presented at that place, or to himself: if he accepts, payable at such place "and not otherwise or elsewhere," he undertakes to pay it at maturity, if presented at that place, but not otherwise. And, if a declaration by endorsee against acceptor of such a bill states that he accepted it "payable at C. and Co's., bankers," and that defendant promised to pay it "according to the tenor and effect thereof," it will be understood that the bill is pleaded according to its legal effect; but that does not imply that the bill is made payable at the bankers' only; and therefore the declaration need not state a presentment there.

**ASSUMPSIT.** The first count of the declaration stated that William Harland, on, &c., made his bill of exchange in writing, and directed the same to defendant, and thereby required defendant to pay to the order of the said W. H. the sum of 66*l.* 1*l.*s. for value received, four months after the date thereof, which period had elapsed, &c., "and the defendant then accepted the said bill, payable at Messrs. Cunliffe and Co's., bankers, London." Averment that W. H. endorsed to plaintiff, and that defendant "then promised the plaintiff to pay her the said bill according to the tenor and effect thereof, and of the said acceptance and endorsement."

The defendant demurred, assigning, as a ground, that, although it appears by the first count that the bill therein mentioned was specially accepted by the defendant, and by him made payable at Messrs. Cunliffe and Co's., bankers, London, yet it is not averred, nor does it appear from the said count, that the said bill was ever presented at Messrs. Cunliffe and Co.'s for payment, according to the terms of the said acceptance. Another ground assigned was, that the defendant was not stated to have had notice of the endorsement.

•87] \*On motion in the Bail court, in Trinity term, 1842, the demurrer was set aside as frivolous; (a) and the plaintiff afterwards signed judgment by default. The defendant then brought error in the Exchequer Chamber, assigning, as error, "that the first count of the said declaration, and the matters therein contained, are not sufficient in law for the said M. S. to have or maintain her aforesaid action," &c. Joinder in error.

The case was argued in this vacation. (b)

*Martin* for the plaintiff in error, defendant below. The first count is bad in substance, because it does not state a presentment at the place

(a) *Skelton v. Halstead*, 2 Dowl. P. C. N. S. 69.

(b) June 16th. Before Tindal, C. J., Coltman, Erskine, and Maule, Js., Parke and Rolfe, Bs.

where the bill was made payable. The averment that the defendant "accepted the said bill, payable at Messrs. Cunliffe and Co.'s, bankers, London," must be taken to state the legal effect of the acceptance. The rule is that "things are to be pleaded according to their legal effect or operation;" Stephen on Pleading, 428, 5th ed. *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66, there cited, shows that, if the substance of a document be stated in pleading, the court will assume that its legal effect is no other than that set forth. Now the words here used, "accepted" "payable at" &c., received a judicial construction in *Rowe v. Young*, 2 Brod. & B. 165, and were there held to import, legally, a qualified and not a general acceptance; therefore the present declaration sets forth, as the defendant's contract, an undertaking, as acceptor, to pay the bill when presented at a certain place. Stat. 1 & 2 G. 4, c. 78, s. 1, enacts "that if any person shall accept a bill of exchange, payable at \*the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed" "a qualified acceptance of such bill." This provision relates to the form of an acceptance, and decides only what words, written on a bill, shall be evidence that the acceptor contracted specially to pay at a particular place; it does not alter the effect of words used in a declaration, when the plaintiff avers that the defendant accepted "payable at," &c. The expression, so used, implies that the defendant accepted in such a way as to make the bill payable not generally but at the specified place. [MAULE, J. If it was a foreign bill the acceptance may not have been written upon it.] If it was not, *Rowe v. Young*, 2 Brod. & B. 165, might still apply; if it was, the declaration must be taken to mean that the acceptance had the words "and not otherwise or elsewhere." The decision of WIGHTMAN, J., in *Skelton v. Halstead*, 2 Dowl. P. C. N. S. 69, was against the present objection; but the authority there relied upon in argument was *Fayle v. Bird*, 6 B. & C. 531, in which case the decision was given with doubt, and on the authority of *Selby v. Eden*, 3 Bing. 611,(a) where, the bill being made payable to the drawer's order in London, it was held that an endorsee might recover against the acceptor without averring or proving \*a presentment in London. But the law on this point is more truly laid down in *Gibb v. Mather*, 2 Cro. & J. 254; S. C. 2 Tyr. 189,(b) and is further explained by *Parks v. Edge*, 1 Cro. & M. 429; S. C. 3 Tyr. 364. The meaning of a "general acceptance" appears to have

(a) In that case, the counsel opposing the rule made two points, one independent of the effect of the statute, the other upon the statute. The counsel in support of the rule, after arguing the former, was stopped as to the latter. But the court, after time taken, discharged the rule on the latter only. (From the notes of counsel engaged in the cause.)

(b) See *Lyon v. Holt*, 5 M. & W. 250.

been misunderstood in *Selby v. Eden*, 3 Bing. 611. If the drawer simply requests the acceptor to pay, and he accepts without qualification, that is a general acceptance, and the bill is payable wherever the payee may present it to the acceptor. But, if the drawer makes the bill payable to his order in London, and it is accepted without qualification, that will not, in an action against the drawer or endorser, have the same effect as the acceptance of a bill containing an unqualified request; for the drawer or endorser is liable only on the acceptor's default; and, if there has been annexed to that liability, by the original request, the condition that presentment shall be made at a particular place, those parties cannot, even since the statute, be made liable without such presentment. In *Blake v. Beaumont*, 1 Dowl. P. C. N. S. 697; S. C. 4 Man. & G. 7, an endorsee declared against the acceptor on a bill drawn by B. and Co. payable to their order in London, and averred to have been accepted, payable at a certain place in London, to wit at the banking house of Williams, Deacon and Co.; and presentment there was alleged and proved: but the bill, when produced, appeared to have been accepted payable at the house of Williams, Deacon and Co. without the addition "and not otherwise or elsewhere." It was argued, on motion to enter a verdict for the defendant, that the proof showed a general acceptance, and therein varied from the count, \*which described a special one. But TINDAL, C. J., said,

\*90] "The effect of the statute 1 & 2 G. 4, c. 78, is to relieve parties from the necessity under which they previously lay, and to allow them to treat that as a general acceptance which before was only a special acceptance requiring special presentment. Although there is in the present case a general acceptance of the bill, that will include the place at which the bill is stated to be payable in the count, as well as all others, and it does not lie in the mouth of the defendant to say that the bill is not payable at the place specified in the count, when that is the very place which he has pointed out by his acceptance as that at which the instrument will be paid." This is, in effect, a decision in favour of the present plaintiff in error, and an answer to the case of *Fayle v. Bird*, 6 B. & C. 531.

*Cowling*, contra. Assuming that the bill in this case is set out according to its legal effect, that effect of the statement on the present record is, that the bill was accepted, payable at Cunliffe's if the holder chose to go there; but the words "payable at" have no restrictive force, like that of the words "not elsewhere:" and, therefore, taking the acceptance here to be correctly stated according to the legal effect, there would, according to *Blake v. Beaumont*, 1 Dowl. P. C. N. S. 697; S. C. 4 Man. & G. 7, be no variance, if an inland bill were produced, accepted "payable at Cunliffe and Co.'s" without the words "and not elsewhere;" and on this view of the pleading the declaration is good. But the declaration, after stating the bill and acceptance, alleges that the defendant below promised to pay

\*91] the bill "according to the tenor and effect thereof, and of the \*said acceptance." It must, therefore, be understood as if the tenor

of the bill and acceptance, (that is the actual language used, were set out on the record, not literally but substantially, the third person being used instead of the first, and the past tense for the present: and, in *Rowe v. Young*, 2 Brod. & B. 165; S. C., 2 Bligh, 391, Lord ELDON and RICHARDSON, J., seem to construe the record in that manner. The question then is, what an acceptance "payable at Messrs. Cunliffe and Co's." means since stat. 1 & 2 G. 4, c. 78. According to *Rowe v. Young*, 2 Brod. & B. 165; S. C., 2 Bligh, 391, an acceptance in these words would be special: but the act was passed expressly to alter that construction. Yet according to the argument for the plaintiff in error that case might be decided in the same manner since the act as before. It is not material to discuss the decision in *Fayle v. Bird*, 6 B. & C. 531; but that case is not necessarily inconsistent with *Gibb v. Mather*, 2 C. & J. 254; S. C., 2 Tyr. 189, and *Parks v. Edge*, 1 Cro. 1 M. 429; S. C., 3 Tyr. 364, where the actions were against, not the acceptor, but the drawer and the endorser. The distinction between these parties is noticed in *Rowe v. Young*, 2 Br. & B. 238, 2 Bligh, 468, by BAYLEY, J., who observes that, in an action against the acceptor, "presentment (generally speaking) need not be averred or proved:" and it may be presumed that the enactment, 1 & 2 G. 4, c. 78, s. 1, subsequently passed, was aimed at the case of defendants who were acceptors. Allegations in pleading must be construed with a reference to the party against whom they are used; here the party whose undertaking is in question is an acceptor; and, in his case, the words of the count must be taken to imply a general acceptance.

\**Martin* in reply. The statute annexes a particular legal meaning to certain words which it requires an acceptor to use when pointing out a specific place of payment. The count here must be taken to mean that form of words was used, and to state their legal effect; not to give, as the form actually used, a set of words which would be incorrect. "According to the tenor and effect thereof" means according to the legal effect. The passage before cited from *Blake v. Beaumont*, 1 Dowl. P. C. N. S. 697, does not bear the construction given to it on the other side, that a bill accepted generally might be described as payable at a particular place because it was payable at that place among others. Such an acceptance has nothing to do with place: it simply creates a debt. If the bill is in fact accepted "payable at" a place "and not elsewhere," it should be described in pleading as payable at that place: if accepted "payable at" the place without any additional words, it should be stated only that the party accepted; as in the form given by Reg. Gen. Trin. 1 W. 4, 2 B. & Ad. 785.(a) [\*92  
*Cur. adv. vult.*

TINDAL, C. J., in the same vacation, (June 29th,) delivered the judgment of the court.

. This was an action by the endorsee of a bill of exchange against the

(a) *Martin* on the following day mentioned *Roach v. Johnston*, Hays and Jones's Reports of Cases in the Courts of Exchequer in Ireland, p. 246.

acceptor. The declaration stated the bill to have been accepted payable at a particular banker's in London, and did not aver any presentment at the house of that banker; and the question argued before us was, whether the omission of such an averment made the declaration bad. The plain-

\*93] tiff in error \*contended that it did, for that, since the statute 1 & 2

G. 4, c. 78, an acceptance payable at a banker's generally without restrictive words, is a general acceptance, and ought to be so pleaded; whereas, by declaring, as in this case, on an acceptance payable at a banker's, the plaintiff must be understood as referring to an acceptance payable at a banker's only, and not elsewhere. And, if the plaintiff in error is right in this proposition, it must certainly follow that the declaration is bad for not averring performance of what, according to his argument, is a condition precedent to any right of action, namely a presentment at the banker's.

But we are of opinion that the argument of the plaintiff in error cannot be supported.

The statute enacts that, where a bill is accepted payable at a banker's, without further expression in the acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill: but the meaning of this enactment is, not that, in such a case, presentment at the banker's shall be an invalid presentment, but that, in an action against the acceptor, presentment to him shall be good, and consequently that it shall be unnecessary to present or to aver presentment at the banker's. A bill of exchange drawn generally on a party may be accepted in three different forms; either generally, or payable at a particular banker's, or payable at a particular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him for payment. If he accepts payable at a banker's, he undertakes (since the statute) to pay the bill at maturity when presented for payment either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at

\*94] \*maturity provided it is presented at the banker's but not otherwise.

Here the bill was accepted according to the second of these three forms; i. e. payable at a banker's, without any restrictive words; so that presentment at the banker's (though if made it would have been a good presentment) was yet not, as against the acceptor, necessary. Acceding, therefore, as we do, to the argument of the plaintiff in error, that the bill must be taken to have been pleaded according to its legal effect, we do not go along with him in the conclusion at which he arrives. For the reasons which we have given, we do not think that, in this case, the legal effect of the bill, as pleaded, was to render necessary any presentment at the banker's; and the judgment of the court below will therefore be affirmed.

Judgment affirmed.

## The QUEEN v. PREECE.

On rule nisi for a quo warranto information for the office of mayor, it appeared that the defendant's eligibility to that office consisted in his being an alderman of the borough, and his election to the latter office was now impeached because the counsel had neglected, at the first election of aldermen, in 1835, to declare which aldermen should go out in 1838: that defendant was alderman in November, 1841, and mayor November, 1842; that by stat. 7 W. 4, and 1 Vict. c. 78, s. 23, no application could, when this rule was moved for, have been made to remove him from his office of alderman; and that, when the court gave judgment on this motion, there would barely have been time to obtain judgment of ouster before the year of the mayoralty would expire. The court in the exercise of their discretion, discharged the rule.

The defendant was elected mayor 9th November, 1842, being then absent from the borough, to which he did not return until 23d November. He had in the mean time casual information of his election, but did not receive any official notice of it until his return. Within five days after his return he made the requisite declaration, and took upon him the office. *Held* a sufficient acceptance of the office within five days after notice, under stat. 5 & 6 W. 4, c. 76, s. 51.

The rule nisi specified the objections to defendant's title as alderman, but did not expressly show that his title as mayor was dependent on his title as alderman; this however, appeared by affidavit. *Held* sufficient within Reg. Gen. Hil. 7 & 8 G. 4.

JERVIS, in last Hilary term, obtained a rule calling upon Richard Matthias Preece to show cause why an information in the nature of a quo warranto should \*not be exhibited against him, to show by what authority he claimed to be mayor of the borough of Carnarvon; [\*95 upon the grounds: 1. That he was not duly elected an alderman of the borough. 2. That there was no due declaration under stat. 5 & 6 W. 4, c. 76, who should under the first election of aldermen under that statute go out of office. 3. That, there being no declaration who should go out, two aldermen continued in office, and, six new aldermen having been elected, there were eight aldermen of the borough, contrary to the provisions of the statute. 4. That there was no proper constituent body at his election as alderman. 5. That the body which elected R. M. Preece to be alderman was itself improperly elected. 6. That R. M. Preece did not, within the time limited by the statute, take upon himself the office of mayor, or make the declaration in that behalf required by the statute. In last Trinity term (a) Sir W. W. Follett, solicitor-general, and Kelly showed cause; and Jervis and Welsby supported the rule.

The course of the argument and the points decided will appear sufficiently from the judgment of the court. The following authorities were referred to; *Regina v. Greene*, 4 Q. B. 646; *Regina v. Hodson*, 4 Q. B. 648, note (b); *Rex v. Stacey*, 1 T. R. 1; *Rex v. Brooks*, 8 B. & C. 321; *Rex v. Peacock*, 4 T. R. 684; *Rex v. Stokes*, 2 M. & S. 71.(b)

*Cur. adv. vult.*

\*Lord DENMAN, C. J., in this vacation, (June 27th,) delivered the judgment of the court. [\*96

(a) June 7th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) Sir W. W. Follett and Kelly objected that the rule did not comply with Reg. Gen. Hil. 7 & 8 G. 4, (6 B. & C. 267,) because it did not show that the defect in Preece's

This was a rule for a quo warranto against the mayor of Carnarvon. The first objection to his title was, that he did not accept his office within the five days after notice, required by stat. 5 & 6 W. 4, c. 76, s. 51, and therefore his election became void. The *notice* was argued on one side to mean no more than the declaration of the result of the election, which, it was said, all persons elected are bound to know: on the other hand, it was said to mean nothing less than a formal notification by some proper authority. The fact lay between, the defendant having been in London on the 9th,<sup>(a)</sup> when the election took place, and from that time till the 23d, when he returned to Carnarvon and took the oath of office \*97] within five days: but he was in the mean time, while in London, made aware by family letters and the congratulations of friends whom he casually met, but not from any official source, that he was elected.

We are of opinion that casual information is not sufficient, and that, before an elected officer can be visited with the heavy penalties imposed for neglecting to accept his office, he must have regular notice of his own election, either by being actually present when it is announced, or by being apprized of the fact by some official authority.

But the validity of this election is challenged on another ground, namely, that he was not well elected alderman, and had been elected mayor as such alderman. But his election to the former office had taken place more than twelve months before this rule was moved for: it was admitted, therefore, that no application could then have been made to remove him from his office of alderman by virtue of stat. 7 W. 4, & 1 Vict. c. 78, s. 23; and that, if removed from the office of mayor, he would still remain a good alderman: and this acquiescence by the present relator, and by all the world, was urged as a reason why, in the exercise of our discretion,

title, intended to be relied on, was the defect in his election as alderman. It was consistent with the rule nisi that defendant's title to the office of mayor was as councillor, not as alderman. If the rule be made absolute, the information must negative something not negatived in the rule. [Lord Denman, C. J. The affidavits show that the relator will rely on the objection that the defendant's election as alderman was bad. The information will not allege that he was alderman or councillor, but generally that he is a usurper.] The defendant might plead that he was councillor; were they to traverse that, they would bring forward an objection not specified in the rule nisi. [Coleridge, J. Surely they may traverse whatever you allege. Stat. 5 & 6 W. 4, c. 76, s. 25, shows that the offices of alderman and councillor must necessarily be distinct. The object of Reg. Gen. Hil. T. 7 & 8 G. 4, is not to restrict the granting of rules, but to regulate the subsequent proceedings; the words are "No objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the court, or of some judge thereof." Does not this rule disclose enough? Lord Denman, C. J. I think it would not, unless the affidavits supplied the defect: but, no argument being offered to the contrary, we must assume that they do. I cannot think that there is any thing in this point. The rule of court merely requires that the rule nisi shall contain a statement of the intended objections, in the nature of a bill of particulars. In showing cause the defendant may set up a different title, which would put this out of question.] See *Regina v. Thomas*, 8 A. & E. 183, 191.

(a) It appeared by the affidavits that Preece was elected alderman November 9th, 1841, and mayor November 9th, 1842.

we should refuse to interfere by information against him. To meet the objection, *Rex v. Stokes*, 2 M. & S. 71, was relied on: that was decided on stat. 32 G. 3, c. 58, ss. 1, 2; the latter of which protected parties from impeachment by quo warranto by reason of any defect of title in the persons electing, nominating, swearing them into office or admitting them, if such last named person had been ten years de facto, and with title unquestioned, in his office: \*and this section was held not to apply where the defect was in the title of the party himself to a former office, which formed in part his qualification to that in question: at least this was held so doubtful that the rule was made absolute. No further proceedings in the case are reported; nor do we find upon inquiry that the point ever came for final decision before the court upon the record. It cannot be denied that there is a strong analogy between that case and the present; and in a case in which we had a less free discretion to exercise than in the granting or refusal of a quo warranto, it might properly bind us. But, upon consideration, we think that we shall best advance the policy of the modern statutes, and preserve the peace of municipal bodies, by refusing to make the rule absolute. [\*98]

It seems to us highly objectionable that the title, which has not been questioned and cannot be questioned, to the inferior office should be impeached at a subsequent period, when the title to a higher office has been built upon it; and that there is an absurdity in ousting a mayor because he was not a good alderman, who, upon his ouster, must immediately be remitted to his office of alderman, and cannot be disturbed in it. It is certainly just that objections intended to be made should be brought forward promptly, while the facts are recent and easily capable of proof or explanation, and it contributes neither to the independence of the office, nor to the harmony of corporations, if such objections are allowed to be kept in reserve, and brought forward in case the conduct of the officer is displeasing to the objector, or he aspires, as he has a right to do, to some higher office. No inconvenience can result to others from the present mayor retaining his office, as the stat. 7 W. 4, & 1 Vict. c. 78, s. 1, makes him a good \*presiding officer at all corporate meetings for election of others at which the mayor ought to preside. Nor could any benefit result from the rule being made absolute, as no judgment of ouster could, with the utmost diligence, be obtained against him till within a very few days of the expiration of his year of office. [\*99]

Upon these grounds, therefore, we think this rule ought to be discharged.  
Rule discharged.

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### GREEN v. MATTHEW ELGIE and TOULMIN.

A warrant of commitment by the Court of Review, made in the matter of E., a bankrupt, after reciting that by an order of the same court therein, on the petition of E., it was ordered that W. G. should stand committed to the Fleet, for his contempt in the said

*petition mentioned*, and that a warrant should issue for that purpose, required the warden of the Fleet to take W. G. and convey him to the Fleet, *there to remain until the further order of the court*. The previous order stated a petition to have been preferred by E. and W. G. might stand committed "for his contempt of the order in the said petition mentioned," but specified nothing further as to the contempt. *Held*, that the warrant and order were bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself.

In an action of trespass against the petitioner's attorney for falsely and maliciously imprisoning plaintiff; plea not guilty; the plaintiff proved that defendant had endorsed his name and address on the warrant sued out for the petitioner, on which plaintiff was committed. *Held* sufficient evidence to support a verdict for plaintiff on such plea.

An attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad. And, although (*semble*) the act of the attorney in handing over the warrant for execution might be so divested of any further proof of concurrence on his part that he would not be liable, he is liable so if his conduct in or after the performance of such act shows a motive beyond the mere wish to discharge professional duty; as if, after the commitment, he has improperly delayed giving information as to costs, which was required by parties wishing to pay such costs and thereby purge the contempt.

Where one of two defendants in trespass is acquitted, and a verdict passes against the other; *semble*, per Lord Denman, C. J., that the latter may move for a new trial without the concurrence of his co-defendant.

**TRESPASS** for maliciously and without reasonable or probable cause assaulting and imprisoning the plaintiff.

Pleas, by Toulmin.

1. Not guilty. Issue thereon.

2. That a commission issued against Matthew Elgie, under which he was adjudged bankrupt: that plaintiff petitioned the lord chancellor to supersede the commission; and such petition, on hearing by the then

\*100] vice-chancellor, was dismissed with costs, which were taxed.

That plaintiff afterwards petitioned the lord chancellor that the vice-chancellor's order of dismissal might be reversed; and he likewise presented two other petitions in the said matter to the lord chancellor. That the lord chancellor, on hearing, dismissed the said petitions with costs, which were taxed. That, the costs being unpaid, an order was made by the Court of Review, on Elgie's petition, that plaintiff should pay the same within fourteen days after personal service of the order. That plaintiff did not so pay; and thereupon the said court, on Elgie's further petition, made an order that plaintiff should pay the costs to Elgie, or to Samuel Morgan, his attorney, within four days after personal service of that order, or, in default, should stand committed to the Fleet prison. That plaintiff was personally served with the order, and made default; and that, he being by reason thereof in contempt of the said court, Elgie petitioned the court, reciting the before-mentioned proceedings as to costs, and the contempt, and praying that plaintiff might immediately stand committed to the Fleet for his said contempt, and that a warrant might issue under the seal of the court for that purpose. The plea then proceeded as follows.

“ And thereupon the said Court of Review, by an order in the matter of the said bankruptcy, bearing date to wit on the 29th day of August, A. D. 1833, did order in the words and figures following, viz. :

“ In Bankruptcy. } Thursday, the 29th day of  
Court of Review. } August, 1833.

In the matter of Matthew Elgie; a bankrupt.

“ Whereas the said Matthew Elgie did, on or about the 19th day of August instant, prefer his petition in the above matter to this court, praying that William Green, \*in the said petition mentioned or described as of Mattersey, in the county of Nottingham, gentleman, [\*101 might immediately stand committed to his majesty's prison of the Fleet for his contempt of the order in the said petition mentioned or referred to, and that a warrant might issue under the seal of this honourable court for that purpose, and that the said William Green might be ordered to pay to the said petitioner, or to Samuel Morgan his attorney therein mentioned, the costs of the said petitioner of and occasioned by that application: Now, upon reading the said petition, and the affidavits of the said petitioner and of the said Samuel Morgan, filed in support thereof, and also the former order of the court herein, bearing date the 31st day of July last, this court doth order that the said William Green do stand committed to his majesty's prison of the Fleet for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose.

“ By the court,

J. V., D. Reg.

“ Whereupon, and in pursuance of the said last mentioned order, a warrant was duly issued out of the said Court of Bankruptcy, under the seal thereof, by the said Court of Review, in the matter of the said bankruptcy, directed to the warden of his then majesty's prison of the Fleet, which said warrant is in the words following, viz.

“ In Bankruptcy. } In the matter of Matthew Elgie,  
Court of Review. } a bankrupt.

“ Whereas, by an order made by this court in the above matter, upon the petition of the said Matthew Elgie, bearing even date herewith, it was ordered that William Green therein named should stand committed to his majesty's prison of the Fleet for his contempt in \*the said petition mentioned or referred to, and that a warrant should forthwith [\*102 issue for that purpose: These are therefore, in pursuance of the said order, to will and require you, forthwith upon receipt hereof, to make diligent search after the body of the said William Green, and wheresoever you shall find him to arrest him, and him safely convey to his majesty's prison of the Fleet, there to remain until the further order of this court; willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables and all other his majesty's loving subjects to be aiding and assisting to you in the due execution of the premises, as they tender his majesty's service and will answer the contrary thereof at their peril: and

this shall be to you and any of you who shall do the same a sufficient warrant. Dated this 29th day of August, A. D. 1833.

“By the court.

J. Vizard, D. Regr.”

“To William Robert Henry Brown, Esq., warden of his majesty’s prison of the Fleet, or this deputy.

“And these,” &c.

“That afterwards, to wit on the day last aforesaid, he did, under the authority of the said last mentioned order and warrant, and in aid and by command of the said warden, in execution of the same, assault and a little ill treat, and did imprison, the plaintiff, and keep and detain him in prison, as in the declaration mentioned, the said several orders and warrant being then and still remaining in full force, as he lawfully,” &c.; “which said trespass herein justified, are the same,” &c. Verification.

Replication: protesting that a commission of bankrupt was not issued against the said Matthew Elgie; that the said M. E. was not adjudged and declared a bankrupt; that plaintiff did not present a petition, &c.,  
 \*103] praying that the commission might be superseded; that the then vice-chancellor did not order that the said petition should be dismissed with costs; that plaintiff did not present a further petition to the then lord chancellor, praying that so much of the said order of the vice-chancellor as related to the dismissal of the first mentioned petition might be reversed, and that plaintiff did not present two other petitions in the said matter to the said lord chancellor; that the lord chancellor did not order that the said petitions should be dismissed with costs; that an order was not made by the judges, &c., (Court of Review,) by which it was ordered that the plaintiff should pay the said several sums of, &c., within fourteen days, &c.; that the said M. E. did not make a further application, by petition to the said judges of the said Court of Review, for another order to enforce and compel plaintiff to pay the said two sums of money; that the said Court of Review did not make another and further order that plaintiff should pay the said sums within four days, &c., or in default thereof should stand committed to the prison of the Fleet; that the said Court of Review did not, by an order in the matter of the said bankruptcy, order in the words and figures set out in that behalf in the said last plea; and that a warrant was not issued out of the said court of bankruptcy, by the said Court of Review, in the words set out in that behalf in the said last plea, in manner and form, &c.: “for replication in that behalf, the plaintiff says, that the defendant of his own wrong, and without the residue of the cause in his said last plea alleged, committed the said several trespasses,” &c., “in manner and form,” &c. Conclusion to the country Issue thereon.

\*104] “Elgie pleaded separate pleas, which are not material, the verdict having passed for him.

On the trial, before COLERIDGE, J., at the sittings in Middlesex after

Trinity term, 1842, evidence was given that the defendant Toulmin, an attorney, had acted in the several proceedings against Green, described by the second plea as the London agent of the defendant Elgie, who was an attorney at Worcester, and Toulmin's partner. Toulmin's name and address were endorsed by him on the warrant of commitment under which the plaintiff was committed in September, 1833. In February, 1841, the plaintiff was brought before COLERIDGE, J., at chambers, by habeas corpus, and discharged after argument by counsel, the learned judge holding the warrant void. Toulmin attended on that occasion, as the attorney opposing Green's discharge. It appeared also that, during Green's confinement (in 1838) 100*l.* had been raised for the purpose of obtaining his liberation; and a witness stated that, with this view, he called on Toulmin, and inquired what amount of costs was due; to which Toulmin answered that he thought Green had been long enough in prison to know the amount; but said afterwards that he would desire his clerk to look into it, and would let the party applying know. The same party stated that he called on defendant Toulmin a second time, again asked for the bill, and tendered 100*l.*, saying it was to release Green; and that defendant then said it would be of very little use, for he could put Green in prison again immediately at his own suit; and, on being further pressed for the particulars, said he would write to his client in a few days, and (without taking the money) ended the conversation in a manner which implied that he was then busy, and which was unsatisfactory to the \*witness. No evidence was offered in defence. COLERIDGE, J., in summing up, [\*105 said that he would advise the jury to treat the warrant as void; that the defendant clearly had something to do with the warrant, as appeared by the endorsement of his name upon it; and that he seemed not merely to have handed over the warrant in his character of attorney, but to have acted with some degree of malice, which might be inferred from his conversation with the witness who tendered money for the costs. His lordship stated his opinion that the verdict ought to be for the plaintiff as against Toulmin, and left the case to the jury as one calling for more than nominal damages. Verdict for plaintiff against Toulmin; damages 150*l.*

*Platt*, in the ensuing term, moved for a rule to show cause why a new trial should not be had, on the ground, as to the plea of not guilty, that there was no evidence to connect Toulmin with the imprisonment. He also moved, by leave reserved, that a nonsuit, or verdict for the defendant on the second issue, might be entered, on the ground that the only matter put in issue by the replication to the second plea was, whether or not Toulmin acted in aid and by command of the warden: and that either he was proved to have so acted, or there was no evidence of his acting at all. He also moved in arrest of judgment, on the ground that the record showed a good warrant by a court having jurisdiction, and therefore Toulmin could not be a trespasser. A rule nisi was granted.

*Thesiger, Cowling, and Corrie* now showed cause. (a) First, on the issue of not guilty, the facts sufficiently \*showed the defendant to be a trespasser; *Bates v. Pilling*, 6 B. & C. 38, and *Bryant v. Clutton*, 1 M. & W. 408; S. C. Tyr. & Gr. 843; which latter case agrees with *Sowell v. Champion*, 6 A. & E. 407. Lord ABINGER differed from the rest of the court in *Bryant v. Clutton*, 1 M. & W. 408; S. C. Tyr. & Gr. 843, but for a reason not applicable here. Secondly, the special plea does not admit or deny the validity of the warrant, but takes issue on the allegation that Toulmin committed the alleged trespasses "in aid and by command of the said warden." The plaintiff has not attempted to put in issue by a replication de injuriâ the warrant and other documentary matter stated in the plea; but, passing these by, he has traversed a material allegation, upon which, if the verdict was found for him, the defendant's whole case failed, as the court decided to-day in *Robins v. Viscount Maidstone*, 4 Q. B. 811. On this issue nothing could turn upon the warrant, more than if it were struck out of the pleadings. That the averment of acting in aid is an essential one, requiring strict proof, appears from *Staigh v. Gee*, 2 Stark. N. P. C. 445, and *Rose v. Wilson*, 1 Bing. 353, and *Britton v. Cole*, 1 Salk. 408, and other authorities show that the command, in this action, is traversable. Here the defendant did not attempt to prove, in point of fact, any command or acting in aid. The real justification was, as in *Bryant v. Clutton*, 1 M. & W. 408; S. C. Tyr. & Gr. 843, and the two other cases first cited, that the defendant was acting as an attorney: but, to raise that defence properly in an action of trespass, the defendant should have set forth a valid warrant; Co. Litt. 283 a; and a regular course of proceedings, in which he, as attorney, took part. And, further, the defendant here was not assisting the officer, but was putting the law in motion as a principal. If, therefore, the warrant would have justified the officer, still the defendant cannot protect himself by it: *Painter v. Liverpool Gas Company*, 3 A. & E. 433.

But, further, the warrant, if it can be looked into, is bad. It ought to have shown on the face of it whatever was necessary to give jurisdiction; *Christie v. Unwin*, 11 A. & E. 373, recognised in *Brancker v. Molyneux*, 4 Mann. & G. 226. The warrant does not point out, by its own recital or otherwise, even as explicitly as was shown in the *Case of the Sheriff of Middlesex*, 11 A. & E. 273, what the contempt was, or of what court. The cause of imprisonment ought to appear by the warrant; 2 Inst. 52. Again, according to the same authority, the warrant should determine how long the party is to remain in prison: but that is not done here, directly or otherwise. And it is not clear that the Court of Review could legally issue this order, the proceedings having commenced, not before them, but before the vice-chancellor.

(a) Before Lord Denman, C. J., Williams and Coleridge, J. Patteson, J., left the court during the argument.

If the preceding arguments are correct, there can be no ground for arresting the judgment.

*Ogle*, for the defendant *Elgie*, proposed to show cause against the rule, contending that one defendant alone could not move for a new trial, and citing 2 Tidd, 911, (9th ed.,) and *Sir C. Berrington's Case*, 3 Salk. 362, and *Parker v. Godin*, 2 Stra. 813, 814, there referred to. [Lord DENMAN, C. J. I should require very overwhelming authority to decide that, because one defendant has got an acquittal, he can prevent another, who has been improperly fixed \*with liability, from having a new trial. We will hear you if it becomes necessary.] [\*108]

*Barstow* and *C. Clark*, contra. It may be admitted that the motion in arrest of judgment cannot be supported, the issue on the second plea being found against the defendant. Then, as to the plea of not guilty, there was no evidence of an imprisonment by the defendant *Toulmin*. The mere circumstance that his writing appeared on the warrant was no proof. The case turns on a different point from that on which *Bryant v. Clutton*, 1 M. & W. 408; S. C. Tyr. & Gr. 843, was decided. [COLERIDGE, J. You cannot say that, on the plea of not guilty, the conversation with *Toulmin* in 1838 was not material. It would relate back.] At all events, the name of the defendant appears only in connection with a warrant under which the imprisonment took place, and which is a justification. The warrant, in terms, required every one to aid in the execution. The defendant, therefore, on the whole pleadings, was entitled to the verdict. Even if the warrant was bad, the defendant, as an attorney, was not liable unless he had gone beyond the line of his duty: *Sedley v. Sutherland*, 3 Esp. N. P. C. 202. PATTESON, J., referring to that case in *Codrington v. Lloyd*, 8 A. & E. 449, says, "The process, when set aside, is as if it had never existed: and, if the party therefore cannot justify under it, neither can the attorney. If, indeed, the attorney had done no act beyond what his duty required, that might be made a defence, as in a case in *Espinasse*:(a) but that would be under the general issue." In *Painter v. Liverpool Gas Company*, 3 A. & E. 433, the defendants both set the legal process in motion, and were interested as principals: [\*109] it appears that persons enforcing the warrant in a merely official character would not have been deemed liable. And in *Carratt v. Morley*, 1 Q. B. 18, 28, it was held that "a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction." The attorney here, having done no more than was necessary for the prosecution of his client's cause before the Court of Review, is exempt from liability on the same principle.

But, further, the warrant was good. The dictum in 2 Inst. 52, does not apply to the warrant of a Court of Record. *Rex v. James*, 5 B. & Ald. 894, was cited on the hearing before COLERIDGE, J., at chambers: in that

(a) *Sedley v. Sutherland*, 3 Esp. N. P. C. 202.

case, a warrant of commitment, till the party should be discharged by due course of law, was held bad, as too uncertain; but the warrant issued from a limited authority, namely, two justices of the peace. In *Ex parte Malachy*, 1 Mont. & Ayr. 257, and *ibid.* note (a), where a party committed under an order and warrant of the Court of Review was discharged by the same court on motion, the application was previously made to TAUNTON, J., on habeas corpus: but he “declined to interfere, as the committal was on process of contempt of a Court of Record.” [COLERIDGE, J. That is very shortly stated. The learned judge could not mean that wherever the commitment was by a court of record that would be a ground for not interfering. He probably meant only that the parties had better apply to the court itself in which the proceeding took place.] \*By stat. 1

\*110] & 2 W. 4, c. 56, s. 11, the judges of the Court of Review are empowered, with the consent of the lord chancellor, to make general rules for regulating the practice of the Court of Bankruptcy. By the general rules, (a) made accordingly in 1832, it is ordered, (rule 30,) as to petitions presented to the Court of Review, “that it shall not be necessary to recite such petition at length in any order pronounced by the court thereon.” Here the order on which the warrant is founded refers to the petition, in which the contempt would be stated, but does not recite the petition, that being rendered unnecessary by the rule. Rule 35 directs “that the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the lord chancellor:” and, in *Dicas v. Lord Brougham*, 6 Car. & P. 249; S. C. 1 M. & Rob. 309, the lord chancellor’s warrant of commitment, which was not impeached, merely referred to a contemporaneous order for commitment, not stating the cause, and directed that the party should be conveyed to the Fleet, “there to remain until my further order.” [COLERIDGE, J. The order on which the warrant proceeds in this case is not more specific than the warrant: it says, “for his contempt of the order in the said petition mentioned or referred to;” not even stating that the order was made by the Court of Review. It might have been an order of the commissioners. The order which is set forth in *Dicas v. Lord Brougham*, 6 Car. & P. 249; S. C. 1 M. & Rob. 309, stated all the proceedings out of which the contempt arose, as alleged in the petition.] That was before the rules of 1832. In *Coster v. Wilson*, 3 M. & W. 411,

\*111] “a warrant of commitment under an order of justices was held good, though it did not sufficiently state the cause of commitment, except by reference to the order; the Court of Exchequer saying, “The order is perfectly good, and the commitment refers to the order, and therefore incorporates it.” In *Ex parte Malachy*, 1 Mont. & Ayr. 257, the order of commitment, which does not appear to have been held objectionable, was in the same form as that now in question. In *Ex parte*

(a) Law and Practice of Bankruptcy, by Montague and Ayrton, vol. ii. Appendix, p. 241, 2d edit.

*Green*, 1 Mont. Deac. & De Gez, 464, the present order of commitment was discussed before the lord chancellor; but the objections now taken were not suggested. The order of commitment in *Mr. Long Wellesley's Case*, 2 Russ. & Mylne, 639, which was upheld, was "until he shall clear his contempt, and this court make other order to the contrary." [Lord DENMAN, C. J. I do not think any thing of the objection on that ground, because a proceeding for contempt cannot well be enforced in any other form than "till further order of the court."] The authorities as to the proper mode of adjudication in cases of contempt are collected in the *Case of the Sheriff of Middlesex*, 11 A. & E. 273, where a very summary form was held sufficient. [Lord DENMAN, C. J. There is no difficulty as to the doctrine. The question is, whether the warrant here shows the contempt, even in the general way in which it appeared there. It turns altogether on the construction.]

If the warrant is good, the defendant is entitled at least to a new trial, the cause having been tried on an assumption, throughout, that the warrant was bad. A good warrant might have operated with the jury at any rate in mitigation of damages. *Cur. adv. vult.*

\*Lord DENMAN, C. J., in this vacation, delivered the judgment of the court. [\*112]

This was an action of assault and false imprisonment, against Matthew Elgie and Samuel Simpson Toulmin. They pleaded separately the same pleas, not guilty, and, secondly, a justification under a commitment by the Court of Review for a contempt. Elgie was acquitted. The question was, whether the verdict for 150*l.* against Toulmin should not be set aside. Toulmin had sued out a commission against Elgie, who was declared bankrupt. The plaintiff, a creditor, petitioned to supersede the commission: his petition was dismissed with cos's. The proceedings in bankruptcy terminate with the warrant, under which he underwent that imprisonment for which he now seeks redress. He was discharged by my brother COLERIDGE, who held the warrant illegal.

The first question we are to consider is, whether, at the trial, Toulmin was proved to have done any thing towards the imprisonment, so as to require justification. This was treated by my learned brother as too clear for argument. It certainly is. The warrant was written upon by Toulmin, as acting in the matter, before the imprisonment. Then, was the warrant legal? [His lordship here read the order of the Court of Review and the warrant, stated ante, pp. 100, 101.] We are of opinion that it was not. The contempt recited is a contempt *mentioned or referred to in a petition preferred* by the defendant Elgie in his bankruptcy; and the order is, that the said William Green do stand committed to the Fleet prison for his contempt in the said petition mentioned. The warrant refers to this order as the ground of commitment, in which there is no general \*adjudication of a contempt, nor any fact found, nor any thing directed [\*113]

to be done by the prisoner to clear himself from it. No such order or warrant has ever been held good: and, though this is said to be the form sanctioned by the Court of Review, we have no reason to think that it has ever been upheld in the face of these objections. The form employed by the Court of Chancery in former times appears to have been entirely different. One case was cited from 3 Meeson & Welsby (*Coster v. Wilson*, 3 M. & W. 411,) to prove that a warrant of commitment may be legal though made intelligible only by reference to the order on which it is grounded. Here the order itself appears to be bad. In that case the reference was in respect to matters of mere form, by which the jurisdiction might have appeared more distinctly; but the fact of trial, and the evidence of all that is wanted for that purpose, were set out at large; while, in the present case, no offence whatever can be collected from the documents.

Supposing, however, the warrant illegal, another question was raised, how far the attorney can be made a trespasser for merely transmitting it, in the execution of his duty towards his client, from the court from which it came to the officer whom it required to receive the prisoner.

This supposition assumes that the proof of the relation of attorney and client between the two defendants was clear. Granting this, what authority is there for the distinction here supposed in favour of the attorney? On examining the books, only one such authority will be found; a Nisi Prius case, in 3 Espinasse, *Sedley v. \*Sutherland*, Esp. N. P. C. \*114] 202. We must say that that report is at variance with many well considered cases in hanc, of which it will be enough to mention *Braham v. Barker*, 3 Wils. 368, where the point was learnedly discussed and fully decided, and *Codrington v. Lloyd*, 8 A. & E. 449. The distinction is not between attorney and client, but between both of them and the officer, whom they employed to execute his known duty in giving effect to the judgments and orders of competent courts. This distinction is just and reasonable, and has been expounded in *Carratt v. Morley*, 1 Q. B. 18, and several other cases lately decided in this court. And it is not impossible that an attorney may be in the nature of an officer handing over papers which may be afterwards acted upon, with no more concurrence than that of a postman who conveys a letter. When such is his conduct, this principle may protect him; but, if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences.

But even this argument would fail to protect the defendant Toulmin in the present instance, because it is admitted that an officious interference in such proceedings from any indirect motive would divest the attorney of this supposed privilege. Here malice was directly imputed; and that question was properly submitted to the jury. The evidence arising from his writing on the warrant might fall short of this: so might his attendance afterwards at the judge's chambers to oppose the plaintiff's discharge from

custody. But his refusing information as to the amount of costs, which a friend of the \*plaintiff's was ready to pay, led to the protraction of his imprisonment, and furnished cogent proof of such motive. [\*115]

. Rule discharged.

### MARSHALL and Another, Assignees of TOMS, a Bankrupt, v. LAMB.

Stat. 1 & 2 W. 4, c. 56, s. 12, empowers a master in chancery, "acting under any appointment by the lord chancellor to be given for that purpose," to issue a fiat in bankruptcy. A fiat, purporting to be issued by a master in virtue of authority given by the lord chancellor, was proved to have been actually issued by a master who had often issued similar fiats.

*Held* sufficient evidence of the master's jurisdiction to issue the fiat, without specific proof of any authority given him by the lord chancellor.

If a party contemplating bankruptcy voluntarily makes a payment by which the equal distribution of his property under the fiat will be defeated, such payment is a fraudulent preference, though the bankrupt, in making it, did not intend to benefit, nor did in fact benefit, the particular creditor.

As if he pays off a mortgage on property settled to the use of his wife (who had joined in such mortgage,) without previous notice to, or request by, the creditor, to whom it would have been equally beneficial to retain the mortgage; the bankrupt intending only, by such payment, to liberate the wife's property for his own and her benefit.

ASSUMPSIT for money had and received to the use of plaintiffs as assignees of Toms; and on an account stated.

Pleas. 1. Non-assumpsit. 2. That plaintiffs were not nor are assignees, &c., in manner and form, &c. Issues thereon. Notice of disputing the act of bankruptcy, &c., was given.

On the trial, before MAULE, J., at the Liverpool summer assizes, 1842, the fiat in bankruptcy was put in, dated August 25th, 1841. It began as follows. "Upon reading the petition," &c., "I hereby, by virtue of authority for that purpose to me given by the right honourable the lord high chancellor, authorize the said petitioners to prosecute their complaint before," &c., (nominating commissioners;) and it was signed "W. Wingfield." A clerk in the bankrupt's office was called, who stated that the practice of the office was to "send the fiats daily for signature by the master. The examination proceeded as follows. "Do [\*116] you know that the master's name is Wingfield? Yes. Is that the handwriting of the master who acts as a master in chancery? Yes: he has acted for years. Has he signed many fiats to your knowledge? A great many. He has done so before that and since? Yes." The witness had no recollection as to the particular fiat. It was objected, for the defendant, that the plaintiffs were bound to prove a specific appointment by which the master was authorized to grant fiats, according to stat. 1 & 2 W. 4, c. 56, s. 12.(a) The fiat was however received without such proof.

(a) Stat. 1 & 2 W. 4, c. 56, s. 12, enacts, "That in every case wherein the lord chancellor, by virtue of any former act, hath power to issue a commission of bank-

Evidence was then given of an act of bankruptcy committed by Toms on the 18th of August 1841. Before that time the defendant, an attorney at Basingstoke, had advanced 700*l.* to Toms on a mortgage, (dated June 12th, 1840,) of the interest and dividends (and the capital, in a particular event) of 2000*l.* 3 per cent. reduced bank \*annuities, which, by  
 •117] settlement of the bankrupt's marriage, had been conveyed to trustees to pay the dividends for the separate use of his wife during their joint lives, and after her decease to permit the bankrupt, if surviving, to receive them during his life, and on further trusts, which it is unnecessary to state. The wife, in execution of a power reserved to her by the settlement, joined in the mortgage. It included also a policy of insurance on the bankrupt's life, and some leasehold property of his sister, who was a party to the mortgage. There was a covenant for reassignment if the principal, with 5 per cent. interest, should be repaid on the 12th December then next: also a covenant by the bankrupt to repay the said principal and interest on that day; and, further, that, if the said principal and interest should not be then paid, the bankrupt would pay, half-yearly, interest on the said principal sum of 700*l.* or so much thereof as should remain due. A power of sale was given to the defendant if default should be made in payment of principal or interest contrary to the proviso in that respect, and also for two calendar months after notice to pay. And there was a covenant that the mortgagor should possess and enjoy, &c., until default made in payment of principal or interest. On 25th August, 1841, Toms, having bankruptcy in contemplation, paid off the mortgage under the following circumstances, detailed by Lamb in his examination before the commissioners.

“The bankrupt waited upon me at my office in Basingstoke on the 25th August last.” “The bankrupt had not informed me previously to his arrival, by letter or otherwise, of his intention to come over on that day: he did intimate his intention to my managing clerk, about six weeks or  
 •118] two months before, to pay off the \*money, who communicated the same to me. He had not informed me of it at the time he paid me the money. My clerk had chiefly been concerned in this business with the bankrupt and his solicitor. The bankrupt told me that he

rupt under the great seal, it shall and may be lawful for him, and also for the master of the rolls, the vice-chancellor, and each of the masters of the Court of Chancery, acting under any appointment by the lord chancellor to be given for that purpose on petition made to the lord chancellor against any trader having committed any act of bankruptcy by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same elsewhere before such discreet and proper persons as the lord chancellor, or as the master of the rolls, vice-chancellor, or one of the masters of the Court of Chancery, acting as aforesaid, by such fiat that may think fit to nominate and appoint; and that the persons so appointed shall thereby have the like power and authority to all intents and purposes as if they were assigned and appointed special commissioners by virtue of a commission under the great seal.”

had called to pay off the money, 700*l.*, he owed upon the mortgage to myself, if I would take the money without notice; and he would pay any interest that might be necessary." "I hesitated to receive the money, not exactly knowing what immediately to do with it. Upon conferring with my partner, we considered it might be taken with interest for the current six months, more than two of which had elapsed: and we so told Mr. Toms: 700*l.* principal money, and 17*l.* 10*s.* for half a year's interest, were thereupon paid: and thereupon Mr. Toms wished to have the deeds." The examination stated that the deeds were sent to the bankrupt. "The bankrupt did not say it would serve him if I would take the money, nor did he press for its reception." "I had not given him any notice previously to pay in the principal: I charged him four months' interest or thereabouts for paying the money without notice. I did not call for it. I took it because I did not know how long the money might have remained unemployed. I should not have acceded to his request without compensation." "I removed the distringas placed upon the stock, and gave the trustees of Mrs. Toms's settlement and the directors of the insurance office notice of the principal and interest on the mortgage being paid. This I did immediately after payment thereof, on the 26th August. The notice to the trustees was given at the request of the bankrupt's solicitor. The bankrupt has informed me that he had destroyed the mortgage deed."

The plaintiffs contended that the payment of 717*l.* \*thus made by the bankrupt to Lamb was a fraudulent preference. The de- [\*119 fendant's counsel argued that it was not so, because the money was paid with no view of benefitting Lamb, but in order to get out of his hands, for the bankrupt's own benefit, the documents which he and his wife had pledged. MAULE, J., said: "The circumstance of a person wishing to prefer a creditor is not a characteristic ingredient in the fraud: it is a thing in spite of which the thing may be fraudulent. It is rather a desire to pay a creditor; it is a laudable desire; but, notwithstanding that be a good and proper thing to be done, the payment may be a fraudulent one as within the bankrupt law. This is much more analogous to the case of a bankrupt conveying away property before his bankruptcy. Where the bankrupt is conveying property in trust for himself, that would be a fraudulent transfer." "Here I do not mean to say you may not be able by argument or by evidence to show that it is otherwise; but it appears to me *prima facie*, at present, that the bankrupt must be taken to have paid this 717*l.* for the purpose of preventing so much money being added to the 300*l.* which the creditors had already got for the purpose of paying their debts, and" of its "being in fact applied to the use of himself and his wife afterwards." And his lordship, in summing up (after referring to the cases in which transactions with the bankrupt are protected by statute,) said: "No transaction is protected by any act of parliament, that amounts to a fraudulent preference to a creditor of a bankrupt; and it is a fraudulent preference of a creditor if the bankrupt, for the purpose of defeating his

other creditors, more particularly for some purpose of benefitting himself to the exclusion of all his creditors, pays money to one, although that creditor may himself be a person \*who is not colluding with the  
 \*120] bankrupt in obtaining that fraudulent preference. If a bankrupt goes to a person who does not know he is going to be a bankrupt, and who has not asked him for money, and pays that person money which he owes him, for the purpose of defeating the claim of his other creditors to that money, whether that be done because he has some partiality for that creditor or from any other motive which induces him to defraud his other creditors, it is a fraudulent preference of that creditor, except in the exemptions I mentioned to you before, of dealing before the issuing of the fiat." He added that the intention in this case was clear from the facts; that, if the jury thought so, the law, as he had stated it, applied, and the only question was whether the act of bankruptcy was proved: and he directed them, if they thought it was, to find a verdict for 717*l.* The jury found accordingly. Leave was given to move to enter a nonsuit on the objection last stated.

*Knowles*, in the ensuing term, obtained a rule to show cause why a nonsuit should not be entered or a new trial had.

*Martin* and *Atherton* now showed cause. (a) First, there was sufficient evidence that Mr. Wingfield was a master appointed under stat. 1 & 2 W. 4, c. 56, s. 12. He was proved to be a master; and he was acting as a public officer, within the scope of the duty pointed out by the act. It must be inferred, on the recognised principle, which is founded on general convenience, that he had the proper authority; *Rex v. Verelst*, 3 Camp. 432.

\*121] \*The power exercised in this case is indeed a special one; but the rule still applies. The acting is evidence, though not conclusive, that Mr. Wingfield was such a master as might lawfully issue a fiat. Secondly, the payment of 717*l.*, made without pressure on the part of the creditor, was a fraudulent preference, and therefore not protected by stat. 2 & 3 Vict. c. 29, s. 1. The validity or invalidity of such a payment does not depend upon the bankrupt's intention towards the creditor: the only question is whether or not the money was paid voluntarily, and in contemplation of bankruptcy; *Morgan v. Brundrett*, 5 B. & Ad. 289. The principle here relied upon by the plaintiffs appears in *Hall v. Wallace*, 7 M. & W. 353, which shows that bona fides, as between the bankrupt and the creditor, does not protect the transaction if its effect be a fraudulent preference; that is, if it defeats that equal distribution among the creditors in general which the bankrupt laws require. This description of a fraudulent preference is recognised by the Court of Common Pleas in *Atkinson v. Brindall*, 2 New Ca. 225. [Lord DENMAN, C. J. We had all the cases before us very lately. (b) Stat. 6 G. 4, c. 16, s. 82, protects every payment bonâ fide made to any creditor before the date and issuing

(a) Before Lord Denman, C. J., Patteson, and Williams, Js.

(b) *Aldred v. Constable*, 4 Q. B. 674.

of a commission, "such payment not being a fraudulent preference of such creditor;" and ALDERSON, B., in *Turquand v. Vanderplank*, 10 M. & W. 180, intimates an opinion that, since stat. 2 & 3 Vict. c. 29, mere payments to creditors are still governed by sect. 82 of the former act. The statute of Victoria was not meant to legalize any acts which before were invalid of themselves; and the singling out one creditor for payment, in fraud of the policy of the bankrupt law, is "an act of this nature. [\*122

[Lord DENMAN, C. J. You say that the bankrupt's wish to benefit himself and his wife by releasing the settled property may be a motive for giving a preference to the particular creditor, which would be illegal.] It is so. The arrangement in the mortgage deed for periodical payments of interest if the principal should not be paid at the day distinguishes the present case from those in which the bankrupt has merely paid money to release a common pledge.

*Knowles and Crompton*, contra. As to the first point. This is not the case of an officer acting in a known public capacity, like the surrogate in *Rex v. Verelst*, 3 Camp. 432. The issuing of fiats by a master is the exercise of a special authority, which is given in a particular manner, and should be proved to have been so given. There is no such officer as a master in chancery exercising the functions of the lord chancellor in issuing fiats. When he is enabled to do so it is not an appointment to an office, but the grant of a power to do a particular act. To make the acting proof of the authority, the thing done should be necessarily incident to the office. [PATTESON, J. The statute does not direct the lord chancellor to give a fresh authority in each particular case.] That is not necessary to the argument. [PATTESON, J. The case of a baron of the exchequer appointed by warrant under the statute(a) to sit in equity in the chief baron's absence would be analogous to this.] His acts would be judicial ones. [Lord DENMAN, C. J. Not till he was proved to be a judge. But he is made so for the particular purpose: and so authority is given to the "master for the purpose of granting fiats. PATTESON, J. The same [\*123 rule of evidence runs through all offices, from that of a judge to that of a vestry clerk.] As to the second point. According to the argument on the other side, no mortgagee giving up his mortgage, or pawnee his pledge, though compelled to do so, would be safe. Suppose a person on the eve of bankruptcy takes up a bill of exchange. [PATTESON, J. If the bill had six months to run, the case might resemble this.] The day for payment of the principal here was past. [PATTESON, J. No notice of payment had been given. You cannot make a mortgagee take his money without giving him notice merely because the day of payment is past. The parties here acted on the assumption that the mortgagee might refuse; for a charge was made, and submitted to, for paying off the mortgage without notice.] As to the payment being voluntary on the part of the bankrupt: redeeming an ordinary pledge is so; taking up a bill of exchange

(a) See stats. 57 G. 3, c. 18, s. 1; 3 & 4 W. 4, c. 41, s. 25.

which is due is also voluntary ; so is the paying money to liberate a document which would place the party in jeopardy ; yet the payments in these cases are held good. To satisfy the words “ being a fraudulent preference of any creditor ” in stat. 2 & 3 Vict. c. 29, s. 1, there must have been an intention to prefer the creditor and thereby give him an advantage. Lord MANSFIELD, in *Harman v. Fisher*, 1 Cowp. 117, relies upon this motive as constituting the illegality. In *Mavor v. Croome*, 1 Bing. 261, the bankrupt made a payment to discharge a lien on property which he was about to dispose of beneficially ; and this was held not to be

•124] affected by the then bankrupt law. Counsel there, in \*argument, likened the case to those “ where a creditor, having a lien on the title deeds of a bankrupt, refuses to deliver them up, except on payment of his debt ; a payment,” they said, “ which has always been esteemed valid, as against any claim on the part of the assignees.” *Thompson v. Beatson*, 1 Bing. 145, is a similar case. It makes no difference in principle, whether the party who is paid off be, in the first instance, willing or unwilling to take the money. The creditor here gave up securities on which he had advanced his money. The assignees could not have recovered them without paying it. [PATTESON, J. They could not at all. They had no interest in them. If the recovery of them could have been of any value to the assignees, it is no matter what the value was. The importance of an intention to prefer was much discussed in *Belcher v. Jones*, 2 M. & W. 258, where a communication made without such design was held no ground for impeaching a payment, though its effect was to give one creditor an advantage over others. *Abbott v. Pomfret*, 1 New Ca. 462, like the present case, turned on the effect of a payment to one with intention to benefit another. In the case of a person on the eve of bankruptcy taking up a bill of exchange not yet due, if circumstances made it important to him to do so (as in the case of *Latham and Parry*,<sup>(a)</sup> the giving money or goods in discharge of such bill would not be a fraudulent preference. [PATTESON, J. Where the creditor has a lien on property of the debtor, there is no fraudulent preference in paying money to discharge it, because the \*assignees, •125] to recover that property, must do the same. But that does not apply to the present case, where the circumstances are totally different.] The real question is what is intended in the transaction between the bankrupt and his creditor, and not what the assignees are to gain. If the bankrupt, in taking up a pledge, intends benefit to himself and not to the pawnee, the exception in stat. 2 & 3 Vict. c. 29, s. 1, does not apply.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (May 29th,) delivered the judgment of the court.

The plaintiffs were assignees of a bankrupt who had borrowed 700*l*.

(a) See *De Tastet v. Carroll*, 1 Stark. N. P. C. 88 ; *Ex parte De Tastet* ; *In re Latham & Parry*, 1 Mont. Ca. Bank, 138.

from the defendant on a mortgage of his wife's estate, and also his sister's, and a policy of insurance belonging to the bankrupt, and covenanted to repay the money with interest at a day long past. When he was in desperate circumstances, and in contemplation of bankruptcy, and after he had committed an act of bankruptcy, he took the money to the defendant, who at first declined to receive it, but, on being paid the then accruing half year's interest, accepted the money, and gave the bankrupt the title deeds and the policy. The assignees sought to recover this money as paid after an act of bankruptcy, and not protected by the statutes 6 G. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29, s. 1, because it was a payment by way of fraudulent preference. The learned judge thought them entitled to a verdict: and the propriety of his decision has been argued before us.

The plaintiffs' counsel contended that all which is required to constitute a fraudulent preference is found in these circumstances; the undisputed contemplation \*of approaching bankruptcy, the subtraction of his money from the fund to be distributed among his creditors, the [\*126 voluntary selection of one of these creditors without pressure or application on his part: and, though the object was admitted to be a direct benefit to the plaintiff, his wife and sister, and the creditor was in no wise benefitted, as he gave up the deeds on receiving the money, yet he was the party *preferred* at the expense of the estate; and the ulterior object can make no difference in the application of the law.

On the other hand, the language of the exceptions in the bankrupt acts was said to confine their operation to cases where a personal benefit to the preferred creditor is intended. Reliance was placed on some expressions of Lord ABINGER and the Court of Exchequer in *Turquand v. Vanderplank*, 10 M. & W. 180. We cannot relieve ourselves from a sense of the great difficulty that surrounds this question: but upon consideration we adhere to the opinion expressed by the learned judge on the trial. If the property in mortgage had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property, and it is indifferent to them whether they have the property free from the mortgage (supposing it to exceed in value the amount of the mortgage) or the property subject to the mortgage and the amount of the mortgage money in cash: but here the property, except the policy, belonged to others. Yet the defendant was a creditor of the bankrupt, because the money was lent to him, and he covenanted to repay it: the payment therefore was, emphatically, a payment \*of the bankrupt's debt in order to release the property [\*127 of his friends which they had mortgaged for his benefit: the defendant therefore did receive twenty shillings in the pound out of the bankrupt's estate to the prejudice of other creditors, although it was no benefit to him, for he would have been as well off if he had kept the mortgage deeds.

Suppose the bankrupt had borrowed money from the defendant on the

joint and several note of himself and a perfectly sufficient and solvent surety, and had voluntarily and in contemplation of bankruptcy paid off the note in order to relieve the surety; the defendant (the lender) would derive no benefit, for the solvent surety would be as good to him as money; yet would not this be a fraudulent preference?

In that as in the present case, it seems to us that the creditor (quoad the bankrupt's estate) is preferred; he receives out of that estate twenty shillings in the pound, whereas the other creditors do not; and he is preferred fraudulently quoad the bankrupt's intention: and, though the motive for giving that preference was ultimate advantage to himself and his own family, and not to the creditor, we think the preference fraudulent and the payment void. Rule discharged.

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\*128] \*CARR v. SMITH and Another, Executors of LEE.

Proprietors of a stage coach arranged among themselves that each should horse the coach for certain stages, and receive the payments and make the requisite disbursements on such stages; and it was the practice that one or more of the partners every month made up, and sent round to the other partners, a written account from the way-bills, showing the receipts and disbursements of each proprietor, the share of net profits, if any, due to each, and the proprietors by and to whom the ascertained shares should be paid: and the payments were made accordingly. In assumpsit by, one partner against another for a balance so adjusted, and not paid, (the partnership still continuing,) the plaintiff's case rested upon a written account made out as above, but not stamped.

*Held*, that if an action at law would lie at all on a settlement of partnership accounts which was not a final close of all the partnership transactions, still the settlement in question, not appearing to have been agreed to by the partners generally, or by the plaintiff and defendant, could be binding only as an award; and that it could not so operate for want of a stamp.

**ASSUMPSIT.** The declaration stated that plaintiff, on 4th December, 1836, and from thence until 3d October, 1840, was a coach proprietor, and he and the said Thomas Lee, deceased, and certain other parties, together, and amongst each other, during all that time ran certain public stage coaches for hire between Manchester in the county of Lancaster and, Leeds in the county of York, and from thence back to Manchester aforesaid, each of the said parties during all that time agreeing respectively, with each other to horse the said stage coaches with their own respective horses upon separate and distinct stages of the said road between the said places; and, in the management and conduct of the said stage coaches, each of the said parties respectively, as occasion required, during all that time received the fares paid for the carriage and conveyance of the passengers and parcels by the said coaches, and made certain disbursements and charges incidental to the running thereof: and it was then agreed between the said parties respectively that the accounts of the said coaches should be from time to time made up and settled by some person duly

authorized by them in that behalf, and the amount of the net profits ascertained, and also the net amount of profits to which each of the said parties was entitled, calculated according to the number of miles horsed by each; and, in case the due and proper disbursements and charges made by any of the said parties, and the net amount of profits to which each party was entitled during any period for which the said accounts were so made up and settled, should exceed the sum received by the said party for fares during the same period, it was to be ascertained and settled in and by the said account what sum such party was to receive so as to put him or them upon an equal footing with the said other parties, and from which of the said parties he or they were to receive the same. And thereupon, in consideration of the premises, and that plaintiff and the said other persons, at the special instance and request of the said Thomas Lee, had, on the day and year first aforesaid, agreed as aforesaid, the said T. Lee undertook to and then faithfully promised plaintiff, if, upon any of the said periodical accounts to be so made out and settled as aforesaid, it should be ascertained that the due and proper disbursements and charges made by plaintiff, and the net amount of profits to which he was entitled, during any period, exceeded the sum received by him for fares during the same period, and the fares received by the said T. Lee during the same period exceeded the sum which he was entitled to hold in order to satisfy his due and proper disbursements and his net amount of profits during the same period, that he the said T. Lee should and would pay to plaintiff, out of such excess, such sum as was directed and appointed by such account to be paid to plaintiff in order to put or to contribute to put him upon such equal footing as aforesaid with the said T. Lee and the said other parties. That plaintiff and the said T. Lee and the said other parties, after the said 4th December, 1836, ran the said stage coaches from and to the places aforesaid upon the said terms, and continued so to do until the 3d October, 1840. That Messrs. Henry Charles Lacy and James Allen were duly authorized by all the said parties to make up and settle the accounts of the said coaches, and they the said H. C. Lacy and J. Allen accordingly periodically made up and settled the said accounts, and, on 25th February, 1837, duly made up and settled the accounts of the said coaches for the period from 4th December, 1836, until the said 25th February, 1837; and upon such settlement it was made to appear in writing, as the fact in reality and truth was, that the disbursements and charges of plaintiff during the said period amounted to 78*l.* 6*s.* 10*d.*, and the net amount of profits to which he was entitled for the same period amounted to 76*l.* 2*s.* 11*d.*, amounting together to 154*l.* 9*s.* 9*d.*, whilst the sum received by him for fares during the same period amounted to 95*l.* 10*s.* 8*d.* only: and that upon the said settlement it was also ascertained and made appear, as the fact in reality and truth was, that the fares received by the said T. Lee during the same period exceeded the sum which he was entitled to hold in order to satisfy his disburse-

men's and charges, and the net amount of profits to which he was entitled during the same period, by a sum exceeding 12*l.* 4*s.* 4*d.* : and the said T. Lee was then directed and appointed in and by the said account to pay plaintiff the said sum of 12*l.* 4*s.* 4*d.*, in order to contribute to the placing plaintiff upon an equal footing with the said T. Lee and the said other parties : of which said account and settlement the said T. Lee then had \*131] notice, and was then requested by \*plaintiff to pay him the said 12*l.* 4*s.* 4*d.* so directed and appointed to be paid to him as aforesaid.

Other settlements of account for subsequent periods were then stated, with like directions for payment of balances by Lee, and notice and request in each case.

Breach, non-payment by Lee in his lifetime and by defendants since his death.

There was a second special count relating to settlements of the same kind for other coaches ; and a third count on an account stated.

Pleas. 1. Non-assumpsit.

2. To the 1st count. That the said H. C. Lacy and J. Allen were not duly authorized by all the said parties in the declaration mentioned to make up and settle the accounts of the said coaches.

3. As to so much of the causes of action in the 1st. count as relates to the making up and settling the accounts of the said coaches from the period from the said 4th December, 1836, until 25th February, 1837 : that the said H. C. Lacy and J. Allen did not duly make up the accounts of the said coaches for the said period in manner and form, &c.

4. As to the causes of action in the last plea mentioned : that upon the settlement of accounts in the last plea mentioned it was not ascertained and made to appear that the fares received by the said T. Lee during the period in the last plea mentioned exceeded the sum which he was entitled to hold in order to satisfy his disbursements and charges, and the net amount of profits to which he was entitled during the same period.

Similar pleas to the 3d and 4th were pleaded to such parts respectively \*132] of the 1st count as regarded the \*other settlements of account therein mentioned. Issues to the country were tendered and joined on each plea.

There were similar pleadings as to the second count.

On the trial, before Lord DENMAN, C. J., at the York Summer assizes, 1842, the practice among the several coach proprietors as to the settling of accounts was proved as stated in the declaration : and it appeared that Lacy and Allen, two of the partners, had been used, though not under any formal authority, to make up the accounts, at intervals of a month or six weeks, from the way-bills, apportion the payments, and name the parties by whom they were to be made. Several of the accounts (printed forms filled up in writing, but not signed or stamped) were produced. They contained, in different columns, the names of the several proprietors, the receipts and particular disbursements of each, the number of miles horsed

by him, and the shares to which he was entitled. Then followed a statement in the following form.

Dr.	Mr. A. B.	Per contra.	Cr.
	£ s. d.		£ s. d.
To cash received	26 7 0	By Share - -	- 6 4 2
		Disbursements -	- 7 17 0
		Pay Mr. C. -	- 0 11 3
		—— D. -	- 0 2 3
		—— E. -	- 5 16 2
		—— F. -	- 5 16 2
	<hr/>		<hr/>
	£26 7 0		£26 7 0
	<hr/>		<hr/>

These accounts, when made up, were sent to the several proprietors: and it was proved that Lee the testator, and others, had been used to pay the sums \*charged, as therein directed: and that this mode of settlement was a general one among coach proprietors. The sums now claimed were demanded of Lee (the partnership still continuing,) but were not paid. For the defendants it was objected, first, that each statement of account produced was an award, and should have been stamped: secondly, that one partner could not sue another on such a settlement of accounts made during the partnership. The lord chief justice reserved leave to move to enter a nonsuit: and the plaintiff had a verdict for 76*l.* 19*s.* 4*d.*, the aggregate of several balances found due from Lee, and ordered to be paid by him to Carr. [\*133]

*R. Hall*, in Michaelmas term, 1842, obtained a rule to show cause why a nonsuit should not be entered on the objections taken at the trial; and, if the plaintiff should be entitled to recover on the account stated only, why the damages should not be reduced to 39*l.* 18*s.* 9*d.*, the amount claimable on a single statement of account. On this latter point he cited *Kennedy v. Withers*, 3 B. & Ad. 767.

*Martin* and *Wortley* now showed cause. First, an award stamp was not necessary. An award is the decision of a person appointed to act as judge upon some matter in dispute. Here no dispute existed; and a mere settling clerk is not an arbitrator. [Lord DENMAN, C. J. It did not appear that the parties settling the accounts had any binding authority.] No one of the accounts had on its face the character of an award; and “the award stamp is only to be imposed on those \*instruments which on their face purport to be awards;” per PARKE, B., in *Sybray v. White*, 1 M. & W. 435; S. C., Tyr. & G. 746. The observations made by the court in the course of argument in *Boyd v. Emmerson*, 2 A. & E. 184, bear strongly against this objection. Secondly, the law as between partners is, that one shall not have an action against another till an account has been taken and a balance ascertained. But, if partners choose to arrange that a periodical account shall be taken, and the balance stated, in a par- [\*134]

particular manner, nothing prevents the bringing of an action after that has been done. *Fromont v. Coupland*, 2 Bing. 170; S. C., 9 B. Moore, 319; S. C., at Nisi Prius, 1 C. & P. 275, was cited in moving for the rule; but there the facts were not so fully before the court as in this case; the account was not considered to be a final striking of a balance; and there was no such evidence of an agreement to pay the balance that might be found due as in the present case. In *Brierly v. Cripps*, 7 C. & P. 709, where the transactions nearly resembled those proved here, TINDAL, C. J., held that one monthly settlement was as final as another, and that the plaintiff might recover from his co-proprietor the balance which appeared due. BAYLEY, B., in *Jackson v. Stopherd*, 2 Cro. & M. 361; S. C., 4 Tyr. 330, lays down the rule applicable to this case. "One partner cannot maintain an action for a balance on the partnership account until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made. But there may be special bargains by which particular transactions are insulated and separated from the winding up of the concern, and  
 \*135] are taken out of the general law of partnership." And assumpsit will lie for the balance ascertained under such agreement, without an express promise to pay; *Rackstraw v. Imber*, Holt, N. P. C. 368; *Wray v. Milestone*, 5 M. & W. 21. Thirdly, as to the account stated, if the opinion of the court is in favour of the objection, the plaintiff will waive that count.

*W. H. Watson*, contra. This case cannot be distinguished from *Fromont v. Coupland*, 2 Bing. 170. Till a balance is struck which winds up the partnership affairs, an action of this kind does not lie. *Brierly v. Cripps*, 7 C. & P. 709, was only a nisi prius decision; and there the partnership was at an end. And the defendant, against whom the ruling in question was, obtained the verdict. In *Jackson v. Stopherd*, 2 C. & M. 361; S. C., 4 Tyr. 330, the partnership had ceased; and the law there laid down is, on the whole, in favour of the present defendants. If the claim on a single adjustment made during the partnership were maintainable, a partner might recover at law for the balance of one month, but the next month's balance might be against him, and, there being nothing to compel a similar adjustment for that month, the partner then claiming a balance might be driven to a suit in equity. [COLERIDGE, J. It is assumed that the monthly adjustment takes place by agreement of the partners.] The adjustment cannot be conclusive while the partnership is going on. Before the account can be stated the partners will have acquired new claims on account of disbursements, and incurred new liabilities. The decision in *Fromont v. Coupland*, 2 Bing. 170, rests upon this  
 \*136] reason. In *Jackson v. Stopherd*, 2 Cro. & M. 361; S. C., 4 Tyr. 330, BOLLAND, B., in summing up the case at nisi prius, treated the dissolution as a material fact. And further, if the action here would lie, there ought to be, if not an express promise to pay the amount found

due, yet an acknowledgment in fact, as in *Wray v. Milestone*, 5 M. & W. 21, where, the balance having been struck, the defendant wrote at the foot of it "Due from me to Mr. Wray," and signed his name. In that case Lord ABINGER said "there is quite sufficient evidence of this being a final account."

But, if the stating of this account was a final and definitive settlement, it was an award and required a stamp. It is not necessary to this view of the case that there should have been disputes: it is sufficient that persons were called in to ascertain something which was undetermined among the parties; that the documents were referred to them, and that they have exercised a judgment and made a final determination in writing. [Lord DENMAN, C. J. Must not there be a power to bind? The persons who settle these accounts seem to be merely servants employed to add up sums.] In *Jebb v. McKiernan*, Moo. & M. 340, a bond had been given, conditioned "for A. M.'s due discharge of the duties of clerk" "to be ascertained by the inspection of A. M.'s accounts by J. Stanton, and the amount so ascertained to be liquidated damages." A paper was produced, in which Stanton had ascertained the amount of a deficiency in A. M.'s accounts. PARKE, J., held that this required stamping as an award, saying: "There is a material difference between the present case and that" of *Leeds v. Burrows*, 12 East, 1, "which was merely the valuation of a given subject. Here the person named is to determine whether there is any thing due." "I incline to think that such a determination is an award." So, in this case, the account drawn up by Lacy and Allen decides the mutual claims and liabilities of the partners. [COLERIDGE, J. Here the defendants say that the settlement was made among the parties themselves, by their servants.] They choose persons in whom they all have confidence, and make them their judges. The language of the declaration agrees with this view of the case. If the account delivered falls short of an award, the defendants are not liable at all.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 29th,) delivered the judgment of the court.

This was an action by one partner in a coach against the executors of another for money had and received. It appeared that the accounts of the partnership were referred at stated periods to a person who adjusted them, and, after ascertaining how much each partner had received and disbursed, divided the profits amongst them according to their respective interests, directing those who had money to pay to the partnership to hand it over to those who had money to receive. Such an account had been adjusted by the appointed person in the lifetime of the testator, and was the foundation of the present action. The partnership continued after such adjustment. The verdict was for the plaintiff.

A rule nisi for a nonsuit was obtained on two grounds. First, that the adjustment of accounts was an award and required a stamp. Secondly,

that no action will lie by one partner against another on a settlement of  
 \*138] \*accounts during the partnership, but only on a final settlement  
 after dissolution. For the plaintiff it was contended that the adjustment was a mere statement of accounts, though a final one, and that a statement which is final, quoad the accounts stated, is a good ground of action, as much as if the whole partnership was at an end.

The case of *Fromont v. Coupland*, 2 Bing. 170; S. C., 9 B. Moore, 319; S. C. at Nisi Prius, 1 C. & P. 275, and other similar cases seem to limit the action to a settlement of accounts on a final close of all partnership transactions: but this case does not necessarily raise that question; for at all events the settlements, in order to ground an action, must be one which is binding and conclusive upon the partners. Now it does not appear here that the adjustment and settlement was ever agreed to by all the partners, nor indeed by the plaintiff and the testator: if therefore it were binding and conclusive on them, it must have been so by reason of the power confided to the persons who drew it up, and in that case it would be an award, and required a stamp. It would come within the authority of *Jebb v. M. Keirnan*, Moo. & M. 340, rather than within *Boyd v. Emerson*, 2 A. & E. 184; *Sybray v. White*, 1 M. & W. 435; S. C., Tyr. & G. 749, and similar cases.

The rule for a nonsuit must be made absolute.

Rule absolute.

\*139] \*WHITTINGTON v. BOXALL and Others.

In trespass quare clausum fregit, if issue be joined on a plea that the close was not the property of the plaintiff in manner, &c., the plaintiff's case is established if he proves possession; and the defendant cannot, on such pleadings, offer evidence of title in himself.

TRESPASS for breaking and entering the plaintiff's close called the garden, and shaking down apples there growing on the plaintiff's trees, and taking away and converting the said apples, &c.

Pleas. 1. Not guilty. 2. "That the said close, trees, apples, and fruit in the said declaration mentioned were not, nor was any part thereof, the property of the plaintiff in manner and form," &c. Issues thereon.

On the trial, before *Taddy*, Serjt., at the Lewes Summer assizes, 1841, it appeared that the defendant Boxall had formerly been tenant of the close in question, which was an orchard, together with a cottage and other land. He gave up the cottage and the last mentioned land; and the plaintiff became tenant of them, and was so when the trespasses were committed. The defendant insisted that he had never given up possession of the orchard; the plaintiff's case was that he, plaintiff, had become tenant of it with the other premises. It also appeared that the orchard had formerly been taken in from the waste of the manor, and rights to it had since been asserted on behalf of the lord and of the copyholders. The lord,

after view of the alleged encroachments, charged a quit rent of 2s. 6d. on the premises, which was paid him by the party under whom the plaintiff claimed, and also by the defendant Boxall for a period before the occupation by that party commenced. The learned serjeant, in summing up the case, told the jury \*that, on this record, the question would be, [ \*140 whose property the close was, as between the plaintiff and defendant; that, as the case stood, possession would be the evidence of title, and would decide the question of property; and that the jury had nothing to do with the rights of the lord and copyholders; but that he who was in possession was the proprietor till some one appeared who had a better title. And he said that he saw nothing on the evidence to distinguish the orchard, in point of possession, from the cottage and the other land. Verdict for plaintiff. In the ensuing term a rule nisi for a new trial was obtained, on the ground of misdirection. In last Michaelmas term, (a)

*Thesiger* and *Ogle* showed cause, and contended that, on these pleadings, the possession only was in dispute; *Heath v. Milward*, 2 New Ca. 98; *Carnaby v. Welby*, 8 A. & E. 872; and that the plaintiff's possession of the close sufficiently appeared, as the evidence did not show any severance between that and the other premises.

*Platt* and *Peacock*, contra, contended that, on the evidence, it was a question, and the substantial one in the cause, whether plaintiff or defendant had the better title to the orchard. The second issue properly raised this question. A plea that the close is not the property of the plaintiff, means that it is not his property as against the defendant. He was not possessed of it, as against the defendant, if he had not the better title. *Ashby v. Minnitt*, 8 A. & E. 121, confirms this. In trover, the \*ques- [ \*141 tion is, whether the property was in the plaintiff, as against the defendant; and the defendant, on an issue as to the property, may prove a lien. [COLERIDGE, J. You seem to argue that, even on the plea of not possessed, the question of title is open. If so, not possessed and liberum tenementum ought not to be pleaded together.] The law on the present subject is explained in *Carnaby v. Welby*, 8 A. & E. 872. The action there was trespass for breaking and entering a dwelling-house and taking goods; one plea was, the goods were not the plaintiff's property. The defence was that the goods had been fraudulently conveyed to the plaintiff. PATTESON, J., said: "*Heath v. Milward*, 2 New Ca. 98, decides that it was sufficient, in an action of this kind, as against wrong doers, if the plaintiff had possession." "The plaintiff does not now put his case as a case of title proved; he says that the fraud was at any rate a matter of doubt, and, if so, the jury should have been directed to find according to the actual possession; and in so putting it I think he is right. The defendants are not entitled to a verdict as against an actual possessor, while they stand in the situation of wrong doers." And, in *Purnell v. Young*, 3 M. &

(a) November 14th, 1842. Beford Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

W. 288, PARKE, B., delivering the judgment of the Court of Exchequer, said:  
 “The plea denying the close to be the plaintiff’s, since the new rules, is a denial of the plaintiff’s title to the close to the same extent that he would have been obliged to prove it before under the general issue; that is, it is  
 \*142] a denial of possession, if the defendant was a wrong doer; \*if otherwise, of the right to the possession; but, in either supposition, it is necessarily a denial of title: for, even in the former case, possession is title against a wrong doer, and therefore the plea raises a question of title in the action.” The law is laid down accordingly in *Kennedy on the New Rules of Pleading*, p. 181, where *Heath v. Milward*, 2 New Ca. 98; *Ashmore v. Hardy*, 7 C. & P. 501, and *Fleming v. Cooper*, 5 A. & E. 221, are cited. In the present case it did appear that the defendant was not a mere wrong doer; and the question of title, therefore, should not have been excluded. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered judgment.

This was an action of trespass for breaking and entering a close of the plaintiff called a garden. To this the defendant pleaded: 1. not guilty: 2. That the close was not the close of the plaintiff. Upon the trial the defendant contended that the close belonged to him; and evidence of title was gone into. The learned judge before whom the cause was tried left no question of title to the jury, but, as to the second plea, desired them to say whether the plaintiff or the defendant Boxall was in possession at the time of the alleged trespass, telling them that property would follow the possession unless some other proprietor appeared. The jury found that the plaintiff was in possession, and returned a verdict in his favour accordingly.

A motion for a new trial was made on the ground that the learned judge  
 \*143] should not have left merely the \*question of possession to the jury, but that, as the defendant Boxall claimed the property in the garden, the facts necessary to determine that point should have been left to them, as well as the question of possession.

Upon showing cause it was contended on the part of the plaintiff that the defendant, under a traverse of the allegation in the declaration that the close was the close of the plaintiff, was not at liberty to show title in himself or some other person through whom he claimed, but that, under that issue, the possession only was in question, and that, if the defendant wished to set up a title, in himself or some other person, superior to that founded on mere possession, he should have pleaded specially in confession and avoidance, admitting the possession but avoiding the effect by showing superior title: and this ultimately became the point for our consideration.

Before the new rules, the plaintiff in an action of trespass *quare clausum fregit*, with the general issue pleaded, was obliged to prove possession at the time of the alleged trespass; and such proof, without any evidence of title or right to the possession, would support a *prima facie* case against the de-

defendant, who was however at liberty, under the plea of not guilty, not only to dispute the possession of the plaintiff in fact, but to show that as against him, the defendant, the plaintiff had no *right* to the possession, because such right was either in himself, the defendant, or in some person by whose authority he acted. However inconvenient and productive of hardship upon the plaintiff this may have been, by suddenly starting a title upon him of which he had no notice, nor indeed any means of knowing whether the defendant meant to rely upon *\*title* at all, it was nevertheless perfectly consistent with the plea of not guilty before [\*144] the new rules. That plea was a general denial that the defendant was a trespasser as alleged: and, as he could not be a trespasser upon his own land, he was at liberty to show that it was his own in order to make out his denial of being a trespasser. It was with a view to correct the hardship and inconvenience arising in this and other cases from the latitude of defence allowed under the general issue, that the new rules upon that subject were established; and now the plea of not guilty in trespass only puts in issue the fact of committing the alleged act of trespass, and not the plaintiff's possession or right of possession, which, if intended to be denied, must be specially traversed.

The plea, that the close is not the close of the plaintiff, is not a traverse of the possession or right of possession of the plaintiff in the *forms* of the new rules: but it is a traverse of a material allegation in the plaintiff's declaration; and the effect of such a traverse is to be considered according to the ordinary rules of pleading. As mere possession is sufficient to maintain trespass against any one who cannot show better title, the plaintiff's allegation that the defendant broke the close of the plaintiff is satisfied *prima facie* by proof that the defendant broke a close in the possession of the plaintiff; and this is not only *prima facie*, but ultimately, sufficient against any one who cannot avoid the effect of it by showing that, notwithstanding the actual possession by the plaintiff, he, the defendant, has a right to it.

Under a plea which merely denies that the close is the close of the plaintiff, the defendant is to be considered, *prima facie* at least, as a mere wrong doer; *\*and*, as against him, possession is not merely evidence of title but actual title, as decided in *Catteris v. Cowper*, 4 Taunt. 547, and *Purnell v. Young*, 3 M. & W. 288. If, then, the traverse means more than that the close is not in the possession of the plaintiff, it is larger than the allegation in the declaration which it traverses, and which asserts no higher or better title than is supported by mere possession against a defendant who shows no title whatever in himself nor in any one under whom he claims, and who, for all that appears upon the pleadings, is a mere wrong doer if the plaintiff proves actual possession. [\*145]

If the defendant not only contests the possession in fact, but also relies upon title in actual possession is proved by the plaintiff, it is far more consistent, not only with the object of the new rules, but with the rules of

pleading generally, and with the principles of justice, that his defence on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only. If the defendant contests the *primâ facie* title of the plaintiff, he is at liberty to do so under the plea denying that the close is his: but, if he means to set up superior title in answer to the *primâ facie* title of the plaintiff, he should plead in confession and avoidance. The Court of Common Pleas in the case of *Heath v. Millward*, 2 New Ca. 98, and this court in the case of *Browne v. Dawson*, 12 A. & E. 624, took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and considered that it put the possession only in issue.

\*146] The counsel for the defendant, upon the argument of \*this case, relied very much upon an expression which fell from Mr. Baron PARKE in pronouncing the judgment of the Court of Exchequer in the case of *Purnell v. Young*, 3 M. & W. 296, and which certainly is at variance with our view of the case. It was, however, quite unnecessary for the purpose of that decision to give greater effect to the plea denying that the close was the close of the plaintiff than we are disposed to give to it: but the learned judge is reported to have said that, since the new rules, a plea in trespass denying the close to be the close of the plaintiff, and concluding to the country, is a denial of the plaintiff's *title* to the close, and allows to the defendant the same liberty of showing title in himself, or any one else under whom he may claim, that he had under the general issue before the new rules. But, with the greatest respect for the opinion of that very learned judge, we cannot, for the reasons already given, come to the same conclusion. It does not appear to us to be warranted by any sufficient analogy between the general denial before the new rules, in the plea of not guilty, of the defendant's being a trespasser *modo et forma*, and a plea traversing only one of the plaintiff's allegations.

The same effect cannot, in our opinion, be given to both, in allowing the defendant not only to contest the possession, which, if proved, satisfies the allegation traversed, but also to avoid the effect of it, by giving evidence showing that the defendant is himself entitled to the possession. The dictum in *Purnell v. Young*, 3 M. & W. 296, is that from which alone we dissent, concurring fully with the decision of that case.

\*147] \*We therefore think that the learned judge who tried this cause was right, and that the rule for a new trial should be discharged.

Rule discharged.(a)

(a) See *Harrison v. Dixon*, 12 M. & W. 142.

## The QUEEN v. The Bishop of BATH and WELLS.

**Stat. 2 & 3 Vict. c. 56**, which, by sect. 15, provides that in every borough jail and house of correction a chaplain shall be appointed "by the same authority by which the keeper is appointed," makes no change in the power of appointment of the keeper, but leaves it in those who formerly exercised it, whether under the jail acts, or by particular franchise.

Queen Elizabeth granted to the corporation of Bath that they might elect two of themselves yearly to be bailiffs of the city, and that the corporation might have within the city a jail for the keeping of prisoners attached, committed or adjudged to the prison for any matter which might or ought to be inquired of in the said city: but persons arrested for offences not cognisable there were to be sent to the county jail: Also that the bailiffs for the time being should be keepers of the city jail. She further granted that the mayor, recorder and certain of the aldermen should be justices of the peace for the city, with power to correct certain offenders, to take sureties of the peace, or commit if they were not found, and to try and determine of certain offences (but not felonies) in the same manner as county justices might. She also granted them a court of record for the trial of personal actions; and the bailiffs had the execution of warrants under such court. Until the passing of stat. 5 & 6 W. 4, c. 76, the corporation annually elected such bailiffs, who had the care and keeping of the jail, and appointed a jailer under them. The corporation was continued by stat. 5 & 6 W. 4, c. 76; and the boundaries of the borough were extended; after which a bailiff was elected annually, and acted with regard to the jail as the bailiffs formerly did. The new corporation obtained a grant of quarter sessions; and, under the powers given by stat. 7 W. 4, & 1 Vict. c. 78, s. 37, they built a new jail, which was also a house of correction, and was regulated by the justices of the city and borough.

**Held**, that the bailiffs were the "keepers" of the jail within the meaning of stat. 2 & 3 Vict. c. 56, s. 15, and therefore that the power of appointing a chaplain was in the town council, and not in the justices; the right of appointment not being affected by any changes which had occurred since the passing of stat. 5 & 6 W. 4, c. 76.

ERLE, in last Easter term, obtained a rule calling on the bishop of Bath and Wells to show cause why a mandamus should not issue, commanding him to grant a license to William Cook Osborn, clerk, to be chaplain of the jail and house of correction for the city and borough of Bath in the county of Somerset and within the diocess of the said lord bishop, if the said W. C. Osborn should by him be found to be a fit and \*proper person to be such chaplain: upon notice of the rule, to be given [\*148 to the bishop or his special commissary, and to the keepers of the peace and justices in and for the said city and borough or some of them. The affidavits for and against the rule stated the following facts.

Queen Elizabeth, by her letters patent, 32 Eliz., incorporated the citizens of Bath by the name of the Mayor, Aldermen, and Citizens of the City of Bath, and granted to the mayor, aldermen, and common council and their successors power to elect yearly two of themselves to be bailiffs of the city, and to fill up any vacancy in the office occurring in any year. The charter also contained a grant to the mayor, &c., "that the said mayor, aldermen, and citizens, and their successors, shall and may have, within the said city or the liberties thereof, a prison and jail for the preservation and keeping of all and singular prisoners attached and to be attached, or committed or adjudged to the prison or jail in any sort howso-

ever, within the liberties of the said city or the precincts thereof, or at the sentence, commandment or suit of us, our heirs and successors, or any other person whatsoever, for any matter, cause or thing which may or ought to be inquired, prosecuted, punished or determined in the said city, there to remain until they be delivered according to law ; and, if any person, persons or prisoners shall be arrested or committed to the jail or prison of the said city for any cause, matter, fact or offence which may not or ought not to be inquired, prosecuted or determined within the said city, that then the mayor, recorder, and such of the aldermen of the said city as for the time being  
 \*149] \*shall be justices of the peace within the said city, or any of them, shall and may have full and absolute power and authority to send and commit such persons or prisoners to the common jail of our said sovereign lady the queen's majesty, her heirs and successors, within the county of Somerset, there to remain until he or they shall be thence delivered according to law. And that the bailiffs of the said city for the time being may and shall be keepers of the jail or prison of the said city."

The charter also contained a grant to the mayor, aldermen, and citizens, and their successors, that the mayor, recorder, and two of the aldermen to be nominated as was therein mentioned, should be jointly and severally justices for the keeping of the peace in the said city, the liberties and precincts thereof, and for the conservation of the same peace, according to the statutes and ordinances of Winton, Northampton, and Westminster, and also to keep the ordinances and statutes of labourers, artificers, servants, hostlers, vagabonds, and other rogues, and to keep or cause to be kept all other ordinances and statutes made and set forth for the good and quiet rule and government of the queen's peace and people, and to correct those whom they should find offenders against the said ordinances and statutes, and to take sureties of the peace and good behaviour, &c., and to commit parties refusing security to the prison of the same city till they should find the same ; and the mayor, recorder, and the said aldermen who should be justices for the time, three or two of them (the mayor or recorder to be one) should have power to inquire by the oath of honest and lawful men of the said city, &c., of all trespassers, forestallers, &c., and those who go or ride armed, &c., and of those who lie in wait, &c.,  
 \*150] and \*of hostlers, and all such as offend in the abuse of weights and measures and in selling of victuals, &c., and of all labourers, mendicants, artificers, servants, hostlers, vagabonds, and all other persons who should offend in the said city, the suburbs or liberties thereof, contrary to the form of the statutes, &c., aforesaid, and to take all indictments concerning the premises, and to proceed, hear and determine of, in and upon the same in such manner and form as justices of the peace in the county of Somerset might proceed, &c., of, in and upon such and the like indictments taken before them in the said county ; and also to inquire, &c., and determine of all and singular other trespasses, offences, defects and articles which do belong or appertain to the office of a justice of

peace, committed or to be done within the said city of Bath, or the suburbs and liberties thereof, so fully, &c., as any other justice of the peace might and should have power to hear and determine in any other county of England; so that, &c. (non intromittant clause, forbidding the interference of any other justices in certain of the matters before stated, arising within the city, suburbs, &c., except in default of the mayor, recorder, and said two aldermen, and their successors.) And that the common clerk of the city for the time being should from thenceforth be clerk of the peace within the same.

By the same charter a court of record for the trial of personal actions was required to be held before the mayor, recorder, and two aldermen being justices, and the bailiffs and their assistants had the execution of warrants under such court. The charter also directed a court of piepowder to be held before the bailiffs; and it appointed the mayor coroner of the city and liberties.

The citizens of Bath were a corporation, under the \*name aforesaid, from the granting of the charter until the passing of stat. 5 [\*151 & 6 W. 4, c. 76, by which act they were continued a corporation under the name of the Mayor, Aldermen, and Burgesses of the city and borough of Bath. Until September 22d, 1834, the mayor, aldermen, and common council annually elected two of themselves to be bailiffs, and such bailiffs had during their respective years of office had the care and keeping, and been keepers, of the jail, and appointed a person to be a jailer under them. From that day hitherto, the mayor, &c., have elected but one bailiff, who has always acted as, and been, keeper of the jail, and appointed the jailer.

The mayor, aldermen, and common council, in 1803, appointed a chaplain to the jail, on whose resignation the council appointed another chaplain, to continue until the new jail then in contemplation should be finished. After this appointment, about December, 1840, the council commenced building a jail and house of correction for the city; it was completed in August, 1842, and, in February, 1843, certified to be fit for the reception of prisoners. The council, on 21st February, 1843, appointed the Rev. W. C. Osborn to be chaplain of the new jail, and gave notice thereof to the bishop of Bath and Wells, in whose diocess the city and borough of Bath, and the new jail, are situate, in order that Mr. Osborn might be licensed. The justices of the peace for the city and borough gave notice to the bishop that they claimed the right of appointing the chaplain and therefore objected to the granting of a license as requested by the council; and the bishop thereupon declined granting it.

The affidavits in opposition to the rule stated: "That \*the [\*152 town council of the city and borough of Bath have lately, under the powers of an act," &c., (7 W. 4, & 1 Vict. c. 78,) "erected a prison in the parish of Tiverton, in the county of Somerset, which prison is a house of correction as well as a jail, and that the justices of the said city

and borough of Bath have and exercise the right of regulating the said jail and house of correction. That by the act" (5 & 6 W. 4, c. 76,) "the metes and bounds of the city of Bath were declared to be the same as the parliamentary boundary, by which means the population of Bath was very considerably increased. That, until a separate court of quarter sessions was granted to the city and borough of Bath under the provisions of the municipal corporation act, there was no jurisdiction in such city and borough to try felonies committed in Bath, but such felonies were tried at the quarter sessions and assizes held in and for the county of Somerset." That, since the decision of the Court of Queen's Bench in *Rex v. Clarke*, 5 B. & Ald. 665, by which the city was declared liable to county rate, "and up to the passing of the municipal corporation act, prisoners committed for trial and to hard labour were sent to the county jail at Ilchester, and to the house of correction for the county, situate at Shepton Mallett: afterwards the council of Bath contracted with the justices of the county of Somerset to maintain the Bath prisoners at Shepton Mallett, which plan was continued till the justices of Somerset refused to renew the contract, and the old Bath jail, though very small and insecure, was made available for the purpose till the completion of the new jail and house of correction.

\*153] "That the recorder and justices commit prisoners to the new jail and house of correction for offences committed within any part of the said city and borough, as well that part comprised within the ancient city, as also within that part which was added to it by the municipal corporation act." And that, before and until the passing of the municipal corporation act, since the decision in *Rex v. Clarke*, 5 B. & Ald. 665, the court of record had greatly fallen into disuse, and, in consequence of prisoners for trial, and those committed for assaults and vagrancy, being sent to Shepton Mallett and Ilchester, very few prisoners were kept in the city jail except debtors imprisoned by the local court of requests, and persons committed in default of finding sureties for good behaviour.

Sir W. W. Follett, solicitor-general, and Smirke showed cause in last Trinity term.(a) The question turns on stat. 2 & 3 Vict. c. 56, which, by s. 15, enacts, "That in every borough jail and house of correction a clergyman of the church of England shall be appointed to be chaplain thereof, by the same authority by which the keeper is appointed." First, that authority is not in the town council. Stat. 7 W. 4, & 1 Vict. c. 78, s. 37, gives to certain town councils, among which is that of Bath, "all the powers for building, enlarging, and repairing any jail or house of correction belonging to their city or borough respectively which the justices having the government or ordering of any jail or house of correction in  
\*154] any city or \*borough" under stats. 4 G. 4, c. 64, and 5 G. 4, c. 85, "had in general or quarter sessions before the passing" of stat. 5 & 6 W. 4, c. 76, subject to any alteration introduced by stat. 5 & 6 W. 4, c. 38; and it enacts that "all things by any act of parliament

(a) June 1st. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

provided to be done at any general or quarter sessions of the peace, in relation to the building, enlarging, or repairing any such jail or house of correction, shall be done at some quarterly meeting of the council." Then sect. 38 enacts, "That all the powers of regulation which before the passing of the said act" (5 & 6 W. 4, c. 76,) "were possessed by the justices having the government or ordering of any such jail or house of correction, and all things by any act of parliament provided to be done at any general or quarter sessions of the peace, in relation to the regulating of any such jail or house of correction, shall, subject to any such alteration as aforesaid, be exercised or done by the justices of the city or borough to which such jail or house of correction shall belong, and for that purpose the justices shall hold a quarterly session at the usual times of holding quarterly sessions of the peace; provided that no order made by the justices in pursuance of these powers which shall require the expenditure or payment of any money shall be of force until confirmed by the council of that city or borough." By these clauses the power of regulation is still left wholly in the justices. There is indeed a proviso at the end of sect. 37, that all rules and regulations made for the government of prisoners in any such jail or house of correction shall be approved by two or more justices acting in and for the city or borough; but this is unintelligible, and seems to have been retained by mistake. The statute says nothing as to the appointment \*of officers for jails. The power now claimed for the town council rests upon the supposition that the bailiffs are the [\*155 keepers, and therefore the council, who appoint them, must, under stat. 2 & 3 Vict. c. 56, s. 15, appoint the chaplain. But it is not clear that the appointment of bailiffs is in the town council, under stat. 5 & 6 W. 4, c. 76. The bailiffs held an office similar to that of sheriffs; the statute, by sect. 61, empowers the councils of certain places to "appoint a fit person to execute the office of sheriff, with the like duties and powers as the sheriff or the person filling the office of sheriff in the said" places "would have had if this act had not passed:" but of these places Bath is not one. And the "keeper," in stat. 2 & 3 Vict. c. 56, s. 15, means the actual keeper of the prison, as appears from stat. 4 G. 4, c. 64, ss. 10, 19, 20, 26, 27, and stat. 2 & 3 Vict. c. 56, s. 6: therefore, if that section excludes the authority of the justices, it is the bailiff who should appoint a chaplain.

But, further, the right to appoint is in the justices.(a) Stat. 4, c. 64, s. 25, empowers the justices in general or quarter sessions "to nominate and appoint such keepers, matrons, taskmasters, schoolmasters and other officers, as to them may seem expedient, for every prison within their jurisdiction to which this act shall extend, except the keeper of the common jail." That exception does not apply to the Bath jail. Stat. 13 G. 3, c. 58, first provided for the appointment of chaplains in county jails; and,

(a) Sir W. W. Follett said that the answer already given was sufficient for the purpose of discharging the rule, but that the parties were anxious to obtain a decision ascertaining in whom the right lay.

under that act (s. 3,) and stats. 22 G. 3, c. 64, s. 12, 31 G. 3, c. 46, s. 1,  
 \*156 and 55 G. 3, c. 48, s. 1, the appointment, both for county jails  
 and for houses of correction, and the regulation of the salary, was  
 confided to the justices in general or quarter sessions. Stat. 4 G. 4, c. 64,  
 introduces regulations for the one common jail and one house of correc-  
 tion (mentioned in sect. 2) of every county in England and Wales, and of  
 every city, town and place mentioned in the schedule (A.) The excep-  
 tion in sect. 25 applies to that common jail, as distinguished from that  
 house of correction. Sects. 5 and 6, and the proviso in favour of the  
 sheriff in sect. 12, show that by the "common jail" the legislature meant  
 the county jail, as distinguished from the house of correction, and that jail  
 only. The difference between a common jail and that of a franchise is  
 marked by stat. 5 H. 4, c. 10; and the charter now in question distin-  
 guishes the one from the other. The regulating power given to justices  
 of cities and boroughs with respect to jails and houses of correction, by  
 stat. 7 W. 4. & 1 Vict. c. 78, s. 38, has been already referred to. It must  
 have been intended that those who exercised such power of regulation  
 should have power to appoint officers. The provisions of stat. 4 G. 4, c.  
 64, are now extended to every jail in England and Wales (with excep-  
 tions which are not here material) by stat. 2 & 3 Vict. c. 56, s. 1. Borough  
 justices, therefore, have the same rights of appointment which were given  
 to justices generally by stat. 4 G. 4, c. 64, where the exception in sect.  
 25 does not attach. The character and constitution of this jail are so much  
 altered by the circumstances detailed in the affidavits that it cannot be  
 considered the same prison as that granted to the corporation by Queen Eli-  
 zabeth; it is therefore the more reasonable that its chaplain \*should  
 \*157] be appointed by the justices under the law now established for all  
 England, and not by the municipal authority.

*Erle, Kelly and Cowling*, contra. Stat. 2 & 3 Vict. c. 56, s. 15, says,  
 only, that the chaplain shall be appointed "by the same authority by which  
 the keeper is appointed." The charter of Elizabeth granted that the bai-  
 liffs should be "keepers" of the jail; no question, therefore, can arise as  
 to the meaning of that word. The distinction between the "keeper" in  
 the sense now contended for, and the person actually taking care of the  
 jail, has no foundation in law. The office of bailiff in this borough is not  
 affected in the manner contended for by stat. 5 & 6 W. 4, c. 76. That  
 statute (sect. 1) preserves whatever is not inconsistent with the subsequent  
 enactments. Sect. 58 empowers the council still to appoint such officers  
 "as have been usually appointed in such borough:" and the authority  
 given to some cities and towns to nominate a sheriff does not take away  
 the right of appointing similar officers where it existed before. The council  
 therefore lawfully appoint the bailiffs, who are keepers of the jail; conse-  
 quently the council ought to appoint the chaplain.

None of the jail acts professes to take away any franchise or power of  
 appointment. Stat. 4 G. 4, c. 64, was passed for the establishment and

regulation of jails and houses of correction in counties and in a limited number of cities and towns. Under that act the justices would, by sect. 25, appoint the keepers of houses of correction, that power not being already vested in any other person; the right of appointment for the county jail was reserved to the sheriff; and, where the right was possessed by others as a franchise, it would continue to \*be so. Stat. 5 G. 4, [\*158 c. 85, was passed to improve and extend the provisions of the former act; and it directs, (sect. 1) that the justices or other persons, "having the government or ordering of any jail or house of correction in any city, town, borough," &c., may contract for the maintenance of their prisoners in any jail or house of correction for the county. Nothing in this act intimates a change in the authority by which officers of the jails were to be nominated. Sect. 7 requires that the chief magistrate of every city, town, borough, &c., where no contract has been made for maintenance in the jail or house of correction under sect. 1, shall return to the secretary of state an account of the establishment of officers and servants employed in such prison; and directs that he shall specify "by whom such officers and servants are respectively appointed; and in sect. 8 a like direction is given to chairmen of quarter sessions as to prisons within their jurisdiction; showing that the legislature contemplated in the former as well as the latter case the existence of prisons in which the officers might be appointed by other persons than the justices. Stat. 7 W. 4, & 1 Vict. c. 78, s. 38, gives the justices of boroughs and cities all the powers of regulation which were possessed, before the passing of stat. 5 & 6 W. 4, c. 76, by the justices having the government of jails and houses of correction; but these are no other than the powers which existed under stats. 4 G. 4, c. 64, and 5 G. 4, c. 85; and sect. 37 of stat. 7 W. 4. & 1 Vict. c. 78, gives to the councils of certain cities and boroughs the same powers for "building, enlarging, and repairing" any jail or house of correction belonging to their city or borough, which the justices having the government of any jail or house of correction in any city or borough, possessed under the two preceding acts. The object \*of the two sections was [\*159 to intrust some powers to the town councils which were formerly confined to justices; and to give some to the justices of boroughs and cities generally which before were possessed by the justices of particular places only. Stat. 2 & 3 Vict. c. 56, was intended, as the first section shows, to extend the regulating powers exercised under stat. 4 G. 4, c. 64, as to the county jails and other prisons there mentioned, and under stat. 5 G. 4, c. 85, as to borough jails, to every jail, house of correction, &c., in England and Wales, with the reservations stated in sect. 1. If the powers of appointment exercised under particular franchises were untouched before, nothing in stat. 2 & 3 Vict. c. 56, can be construed as taking them away. The provisions of sect 15 are continued in sect. 16; and that speaks of the justices "or other persons" having the appointment of the chaplain. All the acts have one uniform intention:

and it is evidently not their policy that the regulation of the officers should rest with those who appoint them. Impartial regulation is better secured by the contrary arrangement. If the right of appointing is clear, the extension of boundaries and of jurisdiction, and the increase in the number of prisoners, cannot alter the franchise. Stat. 4 G. 4, c. 64, was noticed incidentally in *Regina v. The Visitors of the Middlesex Asylum*, 2 Q. B. 433; but nothing was decided which bears on this case. [PATTESON, J. If the office of the bailiffs here is annual, I do not see how they could appoint a deputy.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 26th,) delivered the judgment of the court.

\*160] \*This was an application for a mandamus to the bishop of Bath and Wells: and the question raised, between the town council on the one hand and the justices of the peace for the city of Bath on the other, was as to the right of appointment to the office of chaplain for the jail and house of correction for that borough, the contending parties having agreed to be bound by our decision upon the present application. We have examined the charter of the city and the several statutes referred to in the argument; and we are of opinion that the right of appointment is in the town council of the borough.

The rule which regulates such appointment is laid down by the 15th section of stat. 2 & 3 Vict. c. 56. That section enacts that "in every borough jail and house of correction a clergyman of the church of England shall be appointed to be chaplain thereof *by the same authority by which the keeper is appointed.*" The difficulty has been to ascertain the proper application of the rule.

By the charter of Queen Elizabeth the corporation of Bath had the franchise of a prison or jail; and by the same charter, the mayor, aldermen, and common council were empowered annually to elect two of themselves to be bailiffs of the city for one whole year: and among other duties attached to their office was this, that they should be keepers of the jail or prison of the city. It appears by the affidavits that, previously to the passing of the municipal corporation amendment act, it was the usage to elect two bailiffs; and that there was a prison in the city, with the custody of which they were charged, and were used to appoint the actual keeper or jailer. Since the passing of that act, the town council have an-

\*161] nually appointed one bailiff; and he \*has had the custody of the prison in the same way, discharging the duty, as the two bailiffs formerly did, by the appointment of an actual keeper, or jailer. Under that act a separate court of quarter sessions has been granted, and a separate commission of the peace: the jurisdiction has been enlarged in local extent, and as to the nature of offences within the competency of the justices to try: lastly, the present jail and house of correction has been erected, and is now fit for use.

By the 6th section of the municipal corporation act, after the first election

of councillors, the body corporate was made capable in law *by the town council* to do all acts which it might lawfully have done before : and, as there is nothing in the nature or duties of the office of bailiffs, as described in the charter, which is inconsistent with or may not be modified by the provisions of the statute, it appears to us that the town council would have been warranted in continuing to appoint two bailiffs ; and we cannot say on these affidavits that the single bailiff is not well appointed, though it is immaterial to decide that question on the present application. Under the charter it was the duty of the bailiffs to keep the prison. They appear to have had other duties by the charter, from which it may be inferred that they were keepers of the prison rather as the sheriffs of counties are by law keepers of the county jail than as the actual jailers thereof. This, however, does not alter the legal objection. They might discharge the actual personal duties by the agency of inferior officers ; but they were responsible for those officers, and in law are to be considered responsible for the safe keeping of the inmates, and to be the actual keepers. After the passing of stat. 5 & 6 W. 4, c. 76, if no court of quarter sessions or \*separate commission of the peace had been granted, the duties of the bailiffs in regard to the borough prison would have remained [\*162 unaltered, and, one bailiff only being appointed, he would have been the keeper.

We think the circumstances just stated, and the enlargement of the jurisdiction before mentioned, have made no difference in this respect. The statute 2 & 3 Vict. c. 56, s. 15, appears to us framed with a view to the existing state of things in every borough, and to the avoiding of all questions of right to appoint chaplains which might have arisen upon reference to the general jail acts. It vests the appointment, therefore, at once in that body or individual by whom in any particular borough the keeper is appointed.

It was argued that the term “keeper,” here, by reference to the statutes *in pari materiâ*, must mean the actual jailer, seeing that the clause relates to borough jails only. We are not sure that this is necessarily so. It is not improbable that it may have been used in a larger sense ; but, strictly understood, we think the bailiffs or bailiff of this borough sufficiently answer the denomination ; they are the jailers, acting by their subordinate agents.

Nor is this an inconvenient or unreasonable arrangement ; for, while on the one hand the appointment will be with the town council, with whom must be the power to settle and pay the amount of the salary, the interior regulation and control of the prison still will remain with another independent body, the justices, who will be charged to see that the officer appointed efficiently and regularly discharges his duty, and who are certainly the most competent for such supervision.

We think therefore that the rule should be absolute.

Rule absolute.

•163] •Note to The QUEEN v. The Inhabitants of ARDSLEY, p. 81, ante.

Parish officers applied at petty sessions for an order upon H. for maintenance of a bastard. H. desired a hearing at quarter sessions, and gave recognisances to appear, &c., and pay costs if adjudged the putative father. The quarter sessions dismissed the application, and ordered the parish officers to pay costs to H. The order as returned on certiorari, contained a statement of the recognisances; but they were not sent up. This court, on motion, directed the return to be amended by the recognisances being sent up.

The order of sessions, as signed by the clerk of the peace, and served on the parish officers, appeared to be made at quarter sessions holden by adjournment, but did not show the date of the original quarter sessions. When, however, the order was returned to the certiorari, the date of the original holding was shown by the caption. This court refused to order the return to be amended by making it correspond in the above respect with the order as served.

THE rule for a certiorari was made absolute by PATTERSON, J., in the bail court, in Michaelmas term, 1841. One ground of the application was that the order of sessions, as signed by the clerk of the peace and served upon the parish officers, appeared by the caption to be made at the general quarter sessions holden by adjournment, but did not show when the original sessions were holden. *Rex v. Heptonstall*, (Bur. S. C. 88,) was cited. The order, when returned to this court, showed the date of the original as well as the adjourned sessions; the recognisances mentioned in the order were not sent up. *Pashley*, in Hilary term, 1842, obtained a rule to show cause "why the return should not be taken off the file, in order that it may be amended, and why the time for returning the writ should not be enlarged, and the said return amended in the following respects, viz. by the said justices transmitting that therewith the several recognisances mentioned and referred to in the order of sessions returned by them to the said writ, and by amending the caption of the said order by making the same correspond with the caption of the order of sessions originally drawn by, and signed, H. Dixon, deputy clerk of the peace." In Easter term, 1842, (May 6th, before Lord DENHAM, C. J., and WILKINSON, J.,) Sir G. A. Lewin showed cause, and *Pashley* supported the rule. *Weston Rivers v. St. Peter*, (2 Salk. 492;) *Sanders's Case*, (1 Saund. 263, c. 6th ed. ;) *Rex v. Atkinson*, (note 1) to *Faulkner's Case*, 1 Wm. Saund. 249,) stat. 5 G. 2, c. 19; *Rex v. The Justices of Cheshire*, (5 B. & Ad. 439;) *Rex v. Barker*, (1 East, 186,) and *Regina v. Baines*, (2 Ld. Raym. 1199, 1203,) were referred to. The court took time to consider; and, in the following term, (May 30th, 1842,) after consulting the officers of the crown office, made the rule absolute as to the return of the recognisances only.—Ex relatione *Pashley*.

END OF TRINITY VACATION.

# CASES

ARGUED AND DETERMINED

IN

## THE QUEEN'S BENCH,

IN

### Michaelmas Term and Vacation,

VII. VICTORIA.

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The judges who usually sat in banc in this term and vacation were,  
Lord DENMAN, C. J. COLERIDGE, J.  
WILLIAMS, J. WIGHTMAN, J.

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#### DAWSON v. CHAMNEY.

When chattels have been deposited in a public inn, and there lost or injured, the prima facie presumption is that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted; and, if the jury find in favour of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty.

CASE. The declaration charged that defendant, before and at the time of the committing, &c., was, and from thence hitherto hath been, and still is, an innkeeper; and, as such innkeeper, defendant hath for and during all that time kept, and still doth keep, a certain common inn for the reception, &c., of travellers and their cattle, that is to say a certain inn commonly called, &c.; and, defendant so being such innkeeper and so keeping the said inn as aforesaid, a certain servant of plaintiff heretofore, to wit, on, &c., came to the said inn as a traveller, and then brought into the said inn a certain horse and cart of plaintiff, and put up the same at and in the said inn, and left the same in the said inn for the said horse to be therein stabled, baited, fed and duly taken care of by defendant as such innkeeper as aforesaid until the same should, on the said day, be called for again by plaintiff's said servant, for gain, hire and reward, to be paid, &c.; and defendant, as such innkeeper as aforesaid, then received the said horse and cart into the said inn on the occasion and for the purpose aforesaid: yet defendant, disregarding his duty, did, by himself and his servants, so negligently and carelessly behave and conduct himself in this behalf that afterwards, whilst the said horse remained and continued at and in the said inn for the purpose and on the occasion

aforesaid, to wit on, &c., the said horse, being of great value, to wit, &c., was, by and through the neglect and default of care of defendant and his servants, grievously kicked, &c. by another horse then being in the said inn of defendant, insomuch that thereby one of the thighs of the said horse of plaintiff was broken and fractured, and the said horse thereby then became and was of no use or value to plaintiff, &c.

Pleas, 1. Not guilty. Issue thereon.

2. That the said horse of plaintiff was not put up or left at or in the said inn of defendant for the said horse to be therein stabled, baited, fed and taken care of by defendant as innkeeper, as in the said declaration mentioned, for gain, hire and reward to be paid to him, defendant, in that behalf; and defendant, as such innkeeper as aforesaid, did not receive the said horse and cart, or either of them, on the occasion or for the purpose in the said declaration in that behalf mentioned, in \*manner  
 \*166] and form, &c.: conclusion to the country. Issue thereon.

On the trial, before CRESSWELL, J., at the last Carlisle assizes, it appeared that the defendant was the innkeeper of the Bell and Bullock public house in Penrith, to which inn the plaintiff's servant brought the horse of plaintiff on the Penrith market day. The plaintiff gave the horse in charge to the defendant's hostler, who placed him in a stall where there was another horse: and the injury was done by the other horse kicking the horse of the plaintiff. The defendant's counsel contended that on this evidence the plaintiff must be nonsuited, for want of proof of negligence. The learned judge, however, thought that there was a case for the jury; and the defendant then called witnesses to show that proper care had been taken of the horse. The learned judge directed the jury to find for the plaintiff on the first issue, if they were of opinion that the defendant, by himself or servants, had been guilty of direct injury, or of negligence, but, otherwise, for the defendant. Verdict for defendant on the first issue, and for plaintiff on the second.

*W. H. Watson*, for the plaintiff, now moved for a new trial, on the ground of misdirection. The responsibility of the innkeeper is larger than was laid down by the learned judge: he is answerable for the safe custody of all goods and chattels committed to him, of which he undertakes the care in the character of innkeeper, and must make good even losses occurring without negligence on his part. [Lord DENMAN, C. J. Suppose a fly stung the horse, and injury resulted from the festering of the wound; must the innkeeper make that \*good?] That would be an injury  
 \*167] resulting from the act of God. In *Richmond v. Smith*, 8 B. & C. 9, it was decided that an innkeeper is liable for goods lost in his inn, from a room in which the owner of the goods has directed them to be placed. So it would be if a horse were burnt. In Fitzherbert's Nat. Brev. 94 B, the language of the writ in the Registrum Brevium, (p. 105 a,) is adopted, where it is said that innkeepers are, by the custom of England, to take care of "bona et catalla" being in their inns, "ita quod

pro defectu dictorum hospitatorum vel servientium suorum hospitibus hujus modi damna non eveniant ullo modo.” In Story’s Commentaries on the Law of Bailments, p. 306, ch. vi. s. 470, ed. London, 1839, the law is laid down in words taken from thence; and it is said, p. 308, s. 471, “It is not necessary to prove, that the goods have been lost by the negligence of the innkeeper.” In *Calye’s Case*, 8 Rep. 32 a, the language of the same writ is referred to: and it is said to be confined to “bona et catalla,” and that the innkeeper is not liable if the guest himself be beaten, because that is not a damage to “bona et catalla;” but the beating of a horse is such an injury. In *Sanders v. Spencer*, 3 Dyer, 266 b, the plaintiff failed, because the declaration did not show that the defendant kept a common inn,<sup>(a)</sup> and it appeared that the defendant had told the plaintiff that the goods would not be warranted unless the plaintiff put them in a particular room, which had not been done. But the note there, referring to three rolls of the reign of Henry IV., points out that the innkeeper is bound to warrant goods of his guest, including horses. *Stannian v. \*Davis*, 1 Salk. 404; S. C., 6 Mod. 223, is a strong instance of the application of the rule. There the innkeeper was held liable to [\*168 injury done to a horse which was taken out of the inn and immoderately ridden and whipped, though it did not appear by whom.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (November 14th,) delivered the judgment of the court.

This was a motion for a new trial on the ground of misdirection, the learned judge having told the jury that the innkeeper was not answerable for injury done to the horse of a guest placed in his stable by the kick of another horse, unless there was some negligence proved in the innkeeper. The plaintiff’s learned counsel urged that an innkeeper, like a carrier, was bound at all events to return the guest’s property in as good plight as it came into his custody, and was consequently responsible for any damage which it had received by any means while there.

The law of England is clearly laid down in *Calye’s Case*, 8 Rep. 32 a, which is a full comment on the writ in Fitzh. N. B. One ingredient is, that the loss or damage arises pro defectu hospitatoris vel servientium suorum. When therefore the nature of the injury left the cause wholly doubtful, it was correct to take the opinion of the jury whether the evidence established that it was produced by a defect of such care.

Mr. Justice Story’s comment and excellent treatise on Bailments was quoted, as laying down a different rule. This does not appear to us to be so, if the whole \*passage be examined. That learned author adopts the common law responsibility of innkeepers from the [\*169 Registrum Brevium, in these terms, (s. 470, p. 306 :) “that by the custom of the realm innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss day and

(a) The report refers to Yearb. Hil. 11 H 4, fol. 45 A. pl. 18.

night, so that no damage shall come to them from the negligence of the innkeeper or his servants." And, in sect. 472, he lays it down that "the loss of the goods, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics."

Now in the present case, when the plaintiff had closed his evidence, the learned judge thought that there was a presumption of negligence, and called on the defendant for his answer, which was given by proof of such attention and skilful management as to convince the jury that the damage could not have been occasioned by the negligence imputed. That proof took away the ground of action, according to all the authorities.

The doubt expressed by BAYLEY, J., in *Richmond v. Smith*, 8 B. & C. 9, applies to another branch of the doctrine, namely, the exception from the rule which arises where the guest chooses to take the chattels entirely under his own care. Rule refused.

•170]

\*SIMMONS v. WOOD.

A declaration in debt contained a count on a deed of covenant, whereupon 1500*l.* was claimed as due for principal and interest, and also a count on an account stated. The particulars claimed 1179*l.* for principal and interest "due on the covenant set forth" in the former count. Defendant pleaded non est factum to the former count, and nunquam indebitatus to the latter. Before the trial, the former count was struck out; but the pleadings and particulars were not altered. *Held* that, under the particulars, plaintiff might prove a written admission of 1179*l.* being due for principal and interest, and recover that sum on the account stated.

Another count set out a deed of covenant, dated 21st June, 1839, for payment by defendant to plaintiff of 900*l.* and interest at 5 per cent., on 21st June then next. The action was commenced, and declaration dated, in July, 1843. Breach, non-payment of the 900*l.* and interest on 21st June, 1840, and that there was due and owing a large sum, to wit 1200*l.*, whereby an action had accrued, &c. *Held* good, on motion in arrest of judgment: first, because it did not appear that only one year's interest was due on 21st June, 1840; secondly, because, if that did appear, the averment that more was due might be rejected as surplusage, or a remittitur be entered for the excess.

DEBT. The declaration recited a summons of 3d July, 1843, and was dated 11th July, 1843. The first count alleged that heretofore, to wit 21st June, 1839, by a certain indenture then made between (parties of the first three parts,) the defendant of the fourth part, and the plaintiff of the last part, (profert,) the defendant did, for himself, his heirs, executors, and administrators, covenant, promise and agree to and with the plaintiff, his heirs, executors, administrators, and assigns, that he, defendant, his heirs, executors, or administrators should and would well and truly pay or cause to be paid unto plaintiff, his executors, administrators, or assigns, the sum of 900*l.*, with interest after the rate of 5*l.* for every 100*l.* for a year, upon the 21st day of June then next ensuing, as by the said indenture, &c.; nevertheless defendant did not nor would well and truly pay or cause to be paid to plaintiff the said sum of 900*l.*, and interest for the same, on the

said 21st day of June so appointed for payment, &c., but therein failed and made default; and there is now due and owing, for and on account of the said sum of 900*l.*, and interest, a large sum, &c., to wit 1200*l.*, whereby an action hath accrued, &c.

\*The second count set forth a covenant to pay 1000*l.* and interest at four per cent., whereon a large, &c., to wit 1500*l.*, was due. [\*171

The third count charged that defendant, to wit on 1st June, 1843, was indebted to plaintiff in 600*l.* for money lent, 600*l.* for money paid, and 3000*l.* for money found due, &c., on an account then stated.

Breach, non-payment. Damages, 1000*l.*

Pleas. 1. To the first and second counts, that the indentures therein mentioned are not the deeds, nor is either the deed, of defendant. Issue thereon.

2. To the other counts, *nunquam indebitatus*. Issue thereon.

The bill of particulars was as follows.

This action is brought to recover the sum of 2453*l.* 3*s.* 1*d.*, being the balance due to the plaintiff upon the following account.

Amount of principal due on the covenant set forth in the first count of the declaration	-	-	-	-	-	900	0	0
Interest thereon from the 21st June, 1839, to the 1st July, 1843, at 5 per cent. per annum.	-	-	-	-	-	181	4	7
Amount of costs incurred in collecting rents and offering the property in the indenture in the first count mentioned for sale, under the trusts contained in the said indenture	-	-	-	-	-	30	0	0
Amount of principal due on the covenant set forth in the second count of the declaration	-	-	-	-	-	1000	0	0
Interest thereon from the 8th January, 1839, to the 2d July, 1843, at 4 per cent.	-	-	-	-	-	179	4	7

\*Then followed items of money paid, which, with the items above stated, after deduction for cash received, made up the 2453*l.* 3*s.* 1*d.* [\*172

The cause was tried before WILLIAMS, J., at the last Staffordshire assizes. Before the trial, the second count was struck out on summons. The plaintiff proved the execution of the deed mentioned in the first count, and also proved, under the items of money paid, a debt to the amount of 198*l.* He further gave in evidence, in support of the claim on the account stated, a written admission of the defendant, to the effect that he was indebted to the plaintiff in 1179*l.* 4*s.* 7*d.* principal and interest. The defendant's counsel contended that this sum could not be recovered, as the particulars claimed it only under the count which had been struck out. Under the direction of the learned judge a verdict was taken for the plaintiff for the 1179*l.* 4*s.* 7*d.*, as well as for the other sums proved.

*J. Gray* now moved for a new trial on the ground of misdirection, or

to arrest judgment on the first count. As to the new trial. The plaintiff was not entitled to give evidence either of the 1000*l.* or the 179*l.* 4*s.* 7*d.* These sums were both claimed in the particulars as due on "the covenant set forth in the second count of the declaration." But the second count of the declaration, as the nisi prius record stood, contained no mention of a deed. The plaintiff ought, when the second count was struck out, to have amended his particulars. At any rate, he could not give this claim, so described in the particulars, in evidence under the account stated. Either this part of the particulars has become insensible, or there was a  
 \*173] variance in the proof. The defendant was \*taken by surprise: he might otherwise have pleaded the deed as an answer to the claim on simple contract. [Lord DENMAN, C. J. Would the claim merge in the deed? May not the plaintiff, under a count on an account stated, prove that the defendant acknowledged a sum to have become due on a mortgage deed WILLIAMS, J. When the second count was struck out, you might have had leave to plead *de novo*.] As to the arrest of judgment. Nothing could be recovered on the deed set out in the first count but 900*l.* and one year's interest, which, at five per cent., the rate named in the deed, would be only 945*l.* in all: any additional claim would not be as for a debt, but as for damages. But the count claims 1200*l.* as the debt. It is true that the 1200*l.* is claimed under a *videlicet*; but the amount is material, because an actual debt must be shown, and the amount of it. In case of judgment by default in debt, or of a verdict for the plaintiff on a single plea of *non est factum*, the plaintiff is entitled to the sum named.

*Per Curiam.*(a) There will be no rule on the first point: we will consider of the other. *Cur. adv. vult.*

Lord DENMAN, C. J., in the same term, (November 14th,) delivered the judgment of the court.

This was a motion by Mr. Gray, to arrest the judgment in an action of debt on a mortgage deed, dated the 21st of June, 1839, for payment of 900*l.* and interest at the rate of five per cent. on the 21st of June, 1840. The  
 \*174] action was brought in 1843: and the \*declaration averred that the defendant did not pay the 900*l.* and interest on the day appointed, but therein made default, and that there was then (at the time of the declaration) due and owing, for and on account of the said sum of 900*l.* and interest, a large sum of money, to wit the sum of 1200*l.*, whereby an action had accrued to demand and have *the same* from the defendant. It was said by Mr. Gray that, as nothing could be recovered *as a debt* but the principal money and one year's interest to June, 1840, it was a fatal inconsistency to allege that there was 1200*l.* due and owing on account of the principal money and interest.

But we do not think that there is any weight in the objection. In the first place, it does not appear by the declaration that only one year's inte-

(a) Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

rest was due on the 21st of June, 1840, though that is the day at which it is to be paid. But, even if it did, that circumstance would afford an answer to the objection; for it would then appear that the plaintiff had a good cause of action in debt to the amount of 945*l.*; and his averment that more was due to him might either be rejected as surplusage for the excess, or cured by entering a remittitur for the excess demanded, according to the cases of *Duppa v. Mayo*, 1 Saund. 282; *Thwaites v. Ashfield*, 5 Mod. 213, and *Ingledeu v. Cripps*, 2 Ld. Raym. 814.

Rule refused.

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**\*WILLIAMSON v. TAYLOR and Others.**

[\*175]

By agreement between defendant and plaintiff, defendant, being the owner of a colliery, retained and hired plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and plaintiff agreed to continue defendant's servant during all times the pit should be laid off work, and, when required, (except when prevented by unavoidable cause,) to do a full day's work on every working day.

*Held*, that defendant was not obliged by this contract to employ plaintiff at reasonable times for a reasonable number of working days during the term.

**ASSUMPSIT.** The declaration alleged that, whereas heretofore, to wit 18th March, 1843, defendants, then being owners of a certain colliery called Holywell Colliery, hired and retained plaintiff, and plaintiff, at the request of defendants, then hired himself to defendants, as their servant; for a certain term, to wit from 5th April, 1843, until 5th April, 1844, to work at and in the said colliery, that is to say as a hewer, for wages to be paid to plaintiff by defendants once a fortnight, upon the usual and accustomed day in that behalf, according to the quantity of work to be done by plaintiff, at and after certain rates and prices, and on certain terms, conditions and stipulations, and subject to and under certain penalties and forfeitures then, to wit on, &c., agreed upon between plaintiff and defendants; and, amongst other terms, that plaintiff, at all the times during the said term when the pit of the said colliery should be laid off work, should continue the servant of defendants, so being such owners, and subject to their orders and directions, and liable to be employed by them at such work as defendants should see fit; and, further, that plaintiff should, when required (except when prevented by sickness or other sufficient unavoidable cause,) do and perform a full day's work on each and every working day, or such quantity of work as should be fairly deemed equal to a day's work (not exceeding eight hours) and should not leave his work until such day's work or quantity of work should be \*fully performed or finished to the extent of his ability; and, in default thereof, that plaintiff should for every such default forfeit and pay to defendants 2*s.* 6*d.*; and, further, that the pit of the said colliery should commence coal

[\*176]

work at such times in the morning as should be required to suit the trade, and, in consideration of the premises, and that plaintiff then promised defendants to enter into their service under and by virtue of the said hiring, and to serve and work for them as such their servant as aforesaid, during the said term, for the said wages and according to the aforesaid terms, &c., of the said hiring, and subject to and under the penalties, &c., in that behalf aforesaid, defendants then promised plaintiff to retain and employ him as their servant, and to afford him the opportunity of working and earning wages as such servant during the said term, in pursuance of the said hiring, and according to the aforesaid terms, &c., and subject to and under the penalties, &c., at reasonable times in that behalf, for a reasonable number of working days in that behalf during the said term, and to pay him wages as in that behalf aforesaid: And, although plaintiff, afterwards and at the commencement of the said term, to wit on the 5th April, 1843, entered into the service of defendants, who then and from thence hitherto have been and are owners of the said colliery, under and in pursuance of the said hiring, and always, from that time until the commencement of this suit, was, and still is, ready and willing to serve and work for defendants during the said term, under and in pursuance of the said hiring, for the said wages, and according to the aforesaid terms, &c., and subject to and under the penalties, &c., of which defendants, during the

\*177] said term, to wit on, &c., and always afterwards, had notice, \*and then, and during the said term, to wit on, &c., and on divers other days and times between that day and the commencement of this suit, were requested by plaintiff to employ him, and to afford him the opportunity of working and earning wages as such servant as aforesaid at reasonable times in that behalf, for a reasonable number of working days in that behalf, in pursuance of the said hiring and according to the aforesaid terms, &c., and subject to and under the penalties, &c.: yet defendants disregarded their promise, and did not nor would, after the commencement of the said term, employ plaintiff as their servant, or afford him an opportunity of working or earning wages as such servant during the said term at reasonable times in that behalf, or for a reasonable number of working days, in pursuance of the said hiring, but wholly neglected, &c.; and, on divers days during the said term, and before the commencement of this suit, to wit on the 6th April, 1843, and divers, to wit forty, days between that day and the commencement of this suit, the same being reasonable working days and times in that behalf, wrongfully and unjustly refused to employ plaintiff and to afford him the opportunity of working and earning wages, &c., in pursuance of the said hiring, whereby plaintiff hath lost and been deprived of wages to a large amount, to wit, &c., which he otherwise would and ought to have earned, &c., under and in pursuance of the said hiring.

Pleas. 1. Non-assumpsit. Issue thereon.

2 That defendants did, after the commencement of the said term, to

wit on 6th April, 1843, and thence continually on divers days and times afterwards, employ plaintiff as their servant, and afford him the opportunity of working and earning wages as such servant during \*the said term, at reasonable times in that behalf, and for a reasonable number of working days, during the said term, in pursuance of the said hiring: conclusion to the country. Issue thereon. [\*178]

3. That the said forty days in the declaration in that behalf mentioned, upon which it is in the declaration alleged that defendants refused to employ plaintiff, and to afford him the opportunity of working and earning wages under and in pursuance of the said hiring, were not, nor were nor was any or either of them, reasonable working days or times, or a reasonable working day or time, in that behalf, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before WIGHTMAN, J., at the last Northumberland assizes, the plaintiff, in support of the first issue, relied upon the following agreement, (a) the execution of which was proved.

“Memorandum of agreement, made” 18th March, 1843, “between William Brown Clark’s executors” (represented by defendants,) “owners of Holywell Colliery, on the one part, and the several other persons” (including the plaintiff) “whose names or marks are hereunto subscribed, of the other part.

“The said owners do hereby retain and hire the said several others, parties hereto, from the 5th day of April next ensuing until the 5th day of April which will be in the year 1844, to hew, work, fill, drive and put coals, and do such other work as may be necessary for carrying on the said colliery, as they shall be required or directed to do by the said owners, their executors,” &c., “or their viewer or agents, at the respective rates \*and prices, and on the terms, conditions and stipulations, and subject to and under the penalties and forfeiture, hereinafter specified and declared; that is to say: [\*179]

“First. The said owners agree to pay the said hereby hired parties once a fortnight, upon the usual and accustomed day, the wages by them to be earned at the following rates; namely, to each hewer, for every score of coals,” &c. (specifying the wages to be paid in proportion to the quantities of the several kinds of work done, with regulations as to the manner of performing the work.) “Fifth. The said parties hereby hired shall, during all the times the pit shall be laid off work, continue the servants of the said owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit. Sixth. The said hewers hereby hired shall, when required, except when prevented by sickness or other sufficient unavoidable cause, do and perform a full day’s work on each and every working day, or such quantity of work as shall be fairly deemed equal to a day’s work, not exceeding eight hours, and shall not leave their work until such day’s work, or quantity of work, is

(a) Commonly called a pit bond.

fully performed or finished to the extent of each man's ability; and, in default thereof, each of the said parties hereby hired, and so making default, shall, for every such default, forfeit and pay to the said owners, their executors, administrators or assigns, the sum of 2s. 6d. The pit to commence coal work at such times in the morning as shall be required to suit the trade." Then followed other clauses not material here.

\* The counsel for the defendants contended that the agreement showed  
 \*180] no contract on the part of the defendants to employ the plaintiff, as alleged in the declaration: and the learned judge, being of that opinion, directed a verdict for the defendants on the first issue, giving leave to move to enter a verdict for the plaintiff. On the second and third issues a verdict was found for the plaintiff.

*Granger* now moved according to the leave reserved. It is true that the agreement contains no express contract by the defendants to the effect stated in the declaration. But such a contract arises, by necessary implication, from the contract of the plaintiff. By the fifth clause he is to continue servant to the defendants "during all the times the pit shall be laid off work:" by the sixth clause he must "perform a full day's work on each and every working day:" and the pit is to commence working in the morning at hours suitable to the trade. The parties could not mean that the defendants should be at liberty to keep the pit out of work altogether, and to allow no working days at all. If not, they were bound to find employment at reasonable times; and that, as found by the verdict on the last two issues, they have not done. *Cur. adv. vult.*

Lord DENMAN, C. J., in the same term, (November 25th,) delivered the judgment of the court.

We can judge of the meaning and intent of this agreement only by its terms: and we find nothing in them to warrant the allegation of the promise alleged in the declaration. There is, therefore, no ground for disturbing the verdict. *Rule refused.*

\*181] \*EVERARD and Another v. POPPLETON and Another.

A warrant of attorney to confess judgment was attested by an attorney as follows: "Signed," "by the above named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said G. C. P., before the execution thereof by him." Signed, "J. H. S., attorney, Leeds. J. R."

*Held* an insufficient attestation under stat. 1 & 2 Vict. c. 110, s. 9, for want of a statement that J. H. S. subscribed as attorney for G. C. P.

JUDGMENT and execution were entered up in the above suit on a warrant of attorney executed by the defendants. The signature, &c. by Poppleton was attested as follows.

"Signed. sealed and delivered by the above named George Charles

Poppleton, in the presence of us, of whom the said John Hope Shaw is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said George Charles Poppleton, before the execution thereof by him.

“John Hope Shaw, attorney, Leeds.

“John Richardson.”

The defendants became bankrupt. On application by the assignees, WIGHTMAN, J., upon summons and hearing counsel, at chambers, ordered that the warrant of attorney, the judgment signed, and all subsequent proceedings, should be set aside, on the ground of the attestation not being in sufficient compliance with stat. 1 & 2 Vict. c. 110, s. 9.(a)

\*T. F. Ellis now moved to rescind the order. The learned judge decided this case on the authority of *Poole v. Hobbs*, 8 Dowl. P. C. 113. The attestation there described the attorney merely as “attending at” the “request” of the defendant; and COLERIDGE, J., held that this was not a statement that the attorney subscribed as an attorney. The language was similar in *Potter v. Nicholson*, 8 M. & W. 294, which was decided on the authority of *Poole v. Hobbs*, 8 Dowl. P. C. 113. The principle of these decisions, if they are to be supported, seems to be explained in a case decided as to a different requisite under the same section, *Hibbert v. Barton*, 10 M. & W. 678, where PARKE, B., pointed out that, “at the very moment of the execution of a cognovit or warrant of attorney, a man might come into the room and witness its execution, who had not previously been the attorney of the party.” So the attorney might “attend,” and yet not be acting as attorney in the attestation. But, in the present case, he states that he is so acting at the time of the attestation. [Lord DENMAN, C. J. He does not say that.] He says, in his attestation, that he is acting as attorney, that is, so acting at the moment of making the assertion, which is the moment of attestation. If he were charged, in an indictment, with having subscribed in the character of attorney, such an attestation would be conclusive against him. The statement is a compliance with the statute, unless it be necessary to follow the enactment verbatim. That necessity might perhaps be \*inferred from the language of COLERIDGE, J., in *Poole v. Hobbs*, 8 Dowl. P. C. 113: but in *Elkington v. Holland*, 9 M. & W. 659, PARKE, B., said that the act “does not state the precise terms that are to be used, but merely the substance:” on which point there appears to be some difference of opinion

(a) Which enacts that “no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.”

between PARKE, B., and ALDERSON, B. Afterwards, in *Knight v. Hasty*, 12 Law J. N. S. Q. B. (Bail Court) 293, COLERIDGE, J., is stated to have used these words. "It is said in *Potter v. Nicholson*, 8 M. & W. 294, that I said in *Poole v. Hobbs*, 8 Dowl. P. C. 113, that there must be a literal compliance with the statute; I cannot say whether I did or not: perhaps I said that the attestation should follow the words of the statute as nearly as it could; but the principle of what I said is, that there should be no necessity to have recourse to parol evidence: if I said that the statute was to be literally complied with, I said more than I intended, and my brother PARKE finds fault with my decision, in the subsequent case of *Elkington v. Holland*, 9 M. & W. 659. There is hardly any case in which a statute is to be literally complied with." In *Knight v. Hasty*, 12 Law J. N. S. Q. B. (Bail Court) 293, the question was, whether the words "of me, John Nutt, the attorney of the said W. Hasty," satisfied the words in the statute, "thereby declare himself to be attorney for the person:" and it was urged that the attestation should have followed the statute, and contained the words, "I hereby declare myself his attorney:" but it was held sufficient. [COLERIDGE, J. By using the words *me the attorney* of the party named, does he not "declare" himself to be the attorney?] He does so in substance. [Lord DENMAN, C. J. And in form \*184] too.] The \*declaration may then be formal without the use of the very words of the enactment; and, if so, the attestation here is substantially and formally a compliance with the statute.

Lord DENMAN, C. J. I think the reasons which led to the demanding an exact compliance with the statute are both cogent and sensible. This case, however, does not raise the point; for "acting" is really the same thing as "attending." The attorney attending may stop short in his agency, before the attestation; so may the attorney who is acting. I should like to see the words of the statute always literally followed; nothing is more unfortunate than a disturbance of the plain language of the legislature by the attempt to use equivalent terms. I think the view taken in *Poole v. Hobbs*, 8 Dowl. P. C. 113, was perfectly sound; and I regret that it should be supposed that there has been any disposition to recede from the language there used.

WILLIAMS, J., concurred.

COLERIDGE, J. On consideration, I do not think that my observations in *Poole v. Hobbs*, 8 Dowl. P. C. 113 were wrong. My remarks in *Knight v. Hasty*, 12 Law, J. N. S. Q. B. (Bail Court) 293, were made principally with reference to what was said in *Elkington v. Holland*, 9 M. & W. 659.

WIGHTMAN, J. The words here vary from the language of the statute as much as those in *Poole v. Hobbs*, 8 Dowl. P. C. 113: and, in truth, a different attestation is substituted for that which the legislature prescribes.

Rule refused

**MUSGRAVE v. DRAKE, RAYNER, WARD, FOWLER, D. [\*185  
GOMERSALL, and W. GOMERSALL.**

In an action by endorsee against acceptors of a bill of exchange, some of the defendants pleaded that they did not accept. It was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes.

*Held*, that such proof, without evidence of knowledge on the part of the plaintiff, did not, under this issue, oblige plaintiff to prove the circumstances under which the bill was endorsed to him.

**ASSUMPSIT.** The declaration was on a bill of exchange alleged to have been drawn by Samuel Myers, on 9th December, 1842, directed to defendants, for 20*l.*, payable to the order of Myers at three months, (which had elapsed,) accepted by the defendants, and endorsed by Myers to the plaintiff.

Plea, by Rayner, Ward, D. Gomersall, and W. Gomersall, that they did not accept. Issue thereon.

Drake and Fowler suffered judgment by default.

On the trial, before WIGHTMAN, J., at the last Yorkshire assizes, evidence was given on behalf both of the plaintiff and of the defendants. It appeared that the six defendants carried on business in partnership at the time of the acceptance. The acceptance was written by Drake; and the jury found that he accepted in the ordinary name of the firm, but that the bill was drawn and accepted in fraud of the partnership, and not for partnership purposes. The learned judge directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendants.

*Atherton* now moved accordingly. (a) An acceptance by any one partner in the name of the firm is, undoubtedly, *prima facie* binding upon all the partners. But, if, as here, the evidence shows that the original concoction of the instrument was fraudulent, then the \*plaintiff must show that he has given value; *Heath v. Sansom*, 2 B. & Ad. 291. (b) [\*186 The only question then is, whether the defendants can avail themselves of this defence under a plea of non-acceptance. In default of evidence of value given by the holder, proof of fraud in the concoction goes to negative the acceptance, because it disproves the agency of the person writing the acceptance: it is therefore evidence under the general plea of non acceptit; and a plea stating the fraud in the concoction would be bad on special demurrer. Thus in *Jones v. Corbett*, 2 Q. B. 828, a plea was held to be bad, as amounting to the general issue, which alleged a fraudulent acceptance by defendant's partner, and a want of consideration from the plaintiff, and notice to him. Here, it is true, the want of consideration and the notice were not proved by the defendants: but, as, according to the rule in *Heath v. Sansom*, 2 B. & Ad. 291, (b) that evidence was not

(a) Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(b) See *Bingham v. Stanley*, 3 Q. B. 117.

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required from them, *Jones v. Corbett*, 2 Q. B. 828, is an authority that the defence here insisted upon ought not to have been specially pleaded. In this, as in the last cited case, the defence operates only by negating the acceptance. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, (November 14th,) delivered the judgment of the court.

We have taken pains to ascertain what, as understood in the other courts, would be the course at nisi prius on the trial of such an issue as this. We find that the other courts agree in our view; which is this.

\*187] Where issue is joined on a plea of non accepit, and \*the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction.(a) Rule refused.

(a) See *Mills v. Barber*, 1 M. & W. 425; S. C., Tyr. & G. 835, and the cases there cited. And *Whitaker v. Edmunds*, 1 A. & E. 638; S. C., at N. P. 1 Moo. & Rob. 366.

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## The QUEEN v. The Inhabitants of ADDERBURY EAST.

On indictment against a township for non-repair of a bridge, declarations of ratable inhabitants, whether actually rated or not, may be given in evidence for the crown, such inhabitants being defendants on the record. The admissibility of such evidence is not affected by stat. 3 & 4 Vict. c. 26.

Per Lord Denman, C. J. If such inhabitants are surveyors of highways, and, on inquiry by the attorney for the prosecution, have given details as to the liability and practice of the township in respect of repairs, their statements are admissible as the communications of authorized official agents.

An indictment charged that there was, in township A., an immemorial public bridge, and that the inhabitants of A. had been used, &c., from time whereof, &c., to repair the said bridge. Plea, not guilty. On the trial it appeared that the inhabitants had repaired an immemorial public bridge, but that, in one year, within memory, they had widened the roadway of the bridge from nine to sixteen feet. Held, that whether the added part were repairable by the township or not, there was no variance between the indictment and the evidence.

*Semble*, per Lord Denman, C. J., and Patteson, J., that the township was liable to repair the added part.

INDICTMENT stated: That, from time whereof, &c., there hath been and still is a certain common and public bridge over the river Cherwell, commonly called Nell Bridge, lying and being in a certain common highway of our sovereign lady the queen, for all the liege subjects, &c., on foot, and with their coaches, horses, carts, and carriages, upon and over the said bridge to go, return, &c.; and that one part of the said bridge \*lies and is situate in the township of Adderbury East, in the parish of Adderbury in the county of Oxford, and the other part of the said bridge lies and is situate in the parish of Aynho in the county of Northampton. The in-

dictment then alleged that the said part of the said bridge which lies and is situate in the township of Adderbury East, in the parish, &c.. on. &c., and continually, &c., was and yet is broken, ruinous, &c. ; so that the liege subjects, &c., upon and over the same part, &c., which lies and is situate in the said township of Adderbury East, &c., on foot and with their coaches, &c., could not and cannot go, return, &c., without great danger, &c. ; to the great damage and common nuisance, &c. And that the inhabitants of the township of Adderbury East aforesaid, from time whereof, &c., have repaired and amended, &c., and of right ought, &c., "the said part of the said bridge which lies and is situate in the said township of Adderbury East," in the parish, &c., in the county, &c., when and so often, &c. Averment, that the inhabitants had not repaired the said part of the said bridge which lies and is situate in the township of Adderbury East, &c., but permitted the same to remain broken, &c. There was a second count in the same terms, except that the bridge was stated to be for all the liege subjects, &c., on horseback and on foot: and a third count, alleging a right of passage on foot only. Plea: not guilty. The indictment was found at the Oxfordshire quarter sessions, and was removed into this court by certiorari, and the venue changed to Warwickshire.

On the trial, before PARKER, B., at the Warwickshire summer assizes, 1842, it was proposed to prove, on behalf of the crown, that the solicitor for the \*prosecution, when inquiring into the liability to repair Nell Bridge, had interviews with William Gardner, one of the [\*189 churchwardens, and James Gardner, surveyor of the highways, of Adderbury East, and they, on those occasions, admitted that their township had always repaired the bridge, and showed township books containing entries on the subject. It was not proved that these parties were rate-payers: they lived together in a house within the township; but there was no other proof that they occupied property there. The evidence was objected to on behalf of the defendants; but PARKER, B., after conferring with PATERSON, J., who was in the criminal court, received it.(a) Additional evidence was given from the township books.

(a) The observations of the learned judge upon this part of the evidence appear, by a short hand note, to have been as follows. Adverting to the evidence of declarations above stated, his lordship said: "Whether it is admissible or not, can afterwards be decided by the Court of Queen's Bench, from which this record comes; but, from the best judgment I am able to exercise, I think the evidence admissible. If it were merely the declaration of an individual inhabitant, I do not think it would be fair from that declaration that the township should be deemed bound to repair this bridge. If the case had rested upon the simple declaration of one inhabitant, even though he might be a person well acquainted with the subject, I think it would be slight evidence, and such evidence that the jury ought not to find their verdict upon it; for it would be very hard to fine a whole township from the declaration of one inhabitant, when there are so many other means open of proving the existence of such an obligation. But, besides that, they gave evidence of certain old books, which were in the custody of the churchwarden and the parish surveyor."

The defendants, before the trial, gave a written admission "that Nell Bridge, in the indictment described, is such a bridge as is described in the several counts of the indictment, and crosses the river Cherwell at the place and in the manner alleged in the indictment; and that so much of  
 \*190] one arch of the said bridge as extends \*from the eastern end of the said bridge to the centre of the said arch is situate in the parish of Aynho and county of Northampton; and that all the rest of the said bridge, including the three other arches to the westward of the centre of the said first mentioned arch, is situate in the said township of Adderbury East and county of Oxford, as laid in the indictment. And that the latter or Oxfordshire part of the said bridge was, on the day alleged in the several counts of the indictment, and still is, in want of repair as alleged in the several counts of the indictment." It appeared in evidence that the arch of the bridge over the main stream, situate partly in Northamptonshire and partly in Oxfordshire, was, down to 1806, only nine feet wide as to breadth of road, but was widened at the expense of the township in that year to the breadth of fifteen feet. The road over it was a carriage road both before and after the widening. It was objected for the defendants that the addition of six feet in width, the repair of which must devolve not on themselves but on the county, was such an alteration that the prescriptive liability to repair "the said part of the said bridge which lies and is situate in the said township of Adderbury East," &c., as generally stated in the indictment, was negatived by the proof. PARKE, B., reserved the point: and the jury found the defendants guilty.

*G. Hayes*, in Michaelmas term, 1842, moved, by leave of the learned judge at nisi prius, for a rule to show cause why a verdict should not be entered for the defendants: he also moved for a new trial on the point first stated. A rule nisi was granted on both points.

\*191] \*Sir *W. W. Follett*, solicitor-general, *Adams*, Serjt., and *Humfrey* now showed cause. First, the declarations of William and James Gardner were admissible, because they were defendants on the record. It was suggested in moving for the rule that such declarations were not now receivable, because stat. 3 & 4 Vict. c. 26, has expressly provided, by s. 1, that "no person called as a witness on any trial" "shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed" to the rates for the poor, church, highways, &c.; and, by sect. 2, that no person rated, &c., shall be so disabled by reason only of his being a party to the proceeding, or liable to costs, "when he shall be only a nominal party," "and shall be only liable to contribute to such costs in common with other the rate-payers" &c. But, still, such inhabitant or rate-payer, being a party, is not compellable, though made competent, to give evidence; and therefore his declarations are admissible; *Rex v. Woburn*, 10 East, 395; *Rex v. Hardwick*, 11 East, 578. Independently of the statute,

a party to the record might be a witness, if he was disinterested; *Worrall v. Jones*. 7 Bing. 395.(a) Nothing, therefore, turns upon the competency.

The objection that the bridge, having been widened, was not the bridge immemorially repaired by the defendants, is answered by the admission "that Nell Bridge, \*in the indictment described, is such a bridge [\*192 as is described in the several counts" &c.; that part is situate in Northamptonshire; that "all the rest of the said bridge" is situate in Adderbury East; and "that the latter or Oxfordshire part of the said bridge was, on the day alleged," &c., "and still is, in want of repair as alleged," &c. It is true that parties liable to the repair of a bridge are not bound to widen it; *Rex v. Devon*, 4 B. & C. 670: and, where a foot bridge repairable by a township had been enlarged into a carriage bridge, it was held that the added part must be repaired, like a new bridge, by the county; *Rex v. The West Riding of Yorkshire*, 2 East, 353, note (a): but BULLER, J., was of opinion that the township would remain liable pro rata, in respect of their obligation to repair the ancient part. Here it is admitted that the old part, as well as the new, is out of repair. [COLERIDGE, J. The objection is grounded on the effect which a verdict on this indictment may have hereafter, since it states a liability to repair the bridge generally.] The objection then is, in substance, that the bridge should have been described differently in the indictment. But it would be difficult to show how this could be done. The structure is not the less an ancient bridge because something is added. The additional part, according to BAYLEY, J., in *Rex v. Devon*, 4 B. & C. 679, is pro tanto a new bridge; but it is not the less true that an ancient bridge, repairable by the township of Adderbury East, is out of repair: that was the fact to be stated in the indictment; and the prosecutors were not called upon to allege more. That something added to the original \*structure was new, would be [\*193 matter of evidence; and the defendants would not be unduly prejudiced by a verdict of guilty; for, on a subsequent prosecution, it might be explained by proof how much of the bridge mentioned in this indictment was ancient and how much modern. [LORD DENMAN, C. J. Suppose this were a road merely, instead of a bridge; would it be the less an immemorial highway because a new piece had been added at the side? I do not think the public are called upon to make distinctions on such grounds.]

*Kelly* and *G. Hayes*, contra. First, as to the declarations. The evidence was *prima facie* inadmissible. It lay on the parties offering such proof to show that the persons who made the declarations were defendants on the record: the onus was not on the objectors, as it was in *Marsden v. Stansfield*, 7 B. & C. 815. It does not appear that William and James Gardner were rated inhabitants when they made the declara-

(a) And see *Pipe v. Steele*, 2 Q. B. 733, and stat. 6 & 7 Vict. c. 85. Humfrey mentioned *Hawkenworth v. Showler*, decided this term in the Court of Exchequer, 12 M. & W. 45, in which the competency of a party to the record was much discussed.

tions. [COLERIDGE, J. The inhabitants generally are the defendants on such an indictment as this: they, and the two who usually appear and plead, are never described as rated inhabitants. The fine might be levied on persons not rated.] In *Marsden v. Stansfield*, 7 B. & C. 815, and *Rex v. Kirdford*, 2 East, 559, it was held that inhabitants not rated were, on that account, competent to be witnesses, although ratable. [PATTESON, J. Can a township discharge an individual from liability to repair, by leaving him out of the rate? COLERIDGE, J. The question here is, whether the parties were compellable to be witnesses, not whether they were competent. PATTESON, J. Inhabitants were liable to repair before there was any \*194] rating. All the inhabitants of a parish or \*township are liable for non-repair. What does it matter whether parties are rated or not? If you can show that these persons were compellable to be witnesses, your argument may have weight.] Stat. 3 & 4 Vict. c. 26, must have that effect.

Secondly. The liability to repair, as alleged in the indictment, includes all of the structure that lies in Adderbury East; and the defendants, if judgment passed against them, would be concluded for the future as to the new as well as the old part. The indictment therefore fails altogether. It was clearly not intended by the admission to adopt such a liability; nor do the words incorporate the allegations of the indictment to that extent. [PATTESON, J. The bridge appears to have been widened by the township itself.] Still the new part, if it is of public utility, must be repaired by the county; *Rex v. The West Riding of Yorkshire*, 2 East, 342; *Rex v. Middlesex*, 3 B. & Ad. 201.(a) [Lord DENMAN, C. J. In the latter case the added foot bridge, which the county was held liable to repair, was a distinct structure. PATTESON, J. It was made by road trustees, with the consent of part only of the landholders who were bound to keep up the ancient bridge.] In the earlier case of *Rex v. The West Riding of Yorkshire*, 2 East, 351, note (a), a foot bridge, repairable by certain townships, was enlarged by them to a carriage bridge; and it was held that they could not be charged by indictment as liable to the repair of a carriage bridge. [PATTESON, J. There the character of the bridge was altered. Here the widening was not a making new, but only a mode of repair.] The point, as now put, is not raised on the other side; but the suggestion of it

\*195] \*shows that the form of the indictment is prejudicial, as it precludes the defendants from meeting the supposed difficulty. The allegation, that the township has immemorially repaired and amended "the said part of the said bridge" described in the earlier part of the count, which lies in Adderbury East, is not true when referred to the bridge in question. [COLERIDGE, J. You say that the allegation describes the present state of things; but does not it describe the ancient also?] It includes all that now exists, and cannot be taken distributively. If the defendants suffered judgment on this indictment, and were charged here after with the repair of the whole bridge, it would be thrown upon them

(a) See stat. 43 G. 2, c. 59, s. 5.

to show how much of an immemorial bridge was in the township when this conviction took place. [PATTESON, J. The question would always be, what the immemorial bridge was. Lord DENMAN, C. J. It is as beneficial for you that the subject matter of the indictment should be divisible as otherwise, except for the purpose of an objection on variance.] It would have been easy to allege in the indictment that the defendants had and ought to have repaired a certain part of the said bridge, to wit the breadth of nine feet.

Lord DENMAN, C. J. The first objection is not borne out by stat. 3 & 4 Vict. c. 26. That merely enacts that no person shall be disabled from giving evidence by reason only of his being, as the inhabitant of a parish or township, rated or liable to be rated. But it was not contended here that the parties were disqualified from giving evidence because they were rated: the argument was that, as parties to the record, they were not compellable to be witnesses. And, for that reason, \*their declarations were admissible. I should put this point on higher ground than [\*196 that taken at the bar, and should say that, where persons are discharging a public duty, they are *prima facie* authorized to make communications of this kind, and their admissions are a proceeding which must be evidence against those for whom they act. It would be contrary to common sense to say that a jury could not look at these admissions. As to the second point, I think there is no misdescription. If the township widened the bridge, it appears extremely doubtful, as my brother PATTESON suggests, whether, instead of their being entirely discharged on this account, they are not rendered liable to repair the whole, if it were proved, first, that the original part was repairable by them, and, secondly, that the widening was necessary. But, as to misdescription, the averment is that there was an ancient bridge in the township, repairable by the inhabitants. Proof that any such bridge existed will support that allegation: and, if the defendants say that they are liable to a certain extent only, they may draw their line, and show the amount of liability by evidence.

PATTESON, J. The admissibility of the declarations in evidence here turned, not upon the parties being rated inhabitants, but on their being ratable, and being parties to the record. Overseers or surveyors cannot exempt persons from an indictment by omitting to rate them. Every inhabitant, whether actually rated or not, is liable on an indictment against the inhabitants, and is a defendant on the record. He may, though a defendant, be a competent witness by statute; but it does not follow that the crown could compel him to give evidence \*against his own interest. At all events he is a defendant on the record; and [\*197 what a defendant on the record says is evidence against him in every case. As to the widened part of the bridge, it seems to me that the inhabitants of the township were liable to repair it. In *Rex v. Middlesex*, 3 B. & Ad. 201, the added part was a new bridge. Here the widening was

only a mode of repair. I throw this out that I may not be taken to acquiesce in what has been suggested on this part of the case on behalf of the defendants. I am strongly of opinion that under the present circumstances the township would be liable to the whole repair. But, as to the point of misdescription, the allegation that there is "a certain common and public bridge" which the township has immemorially repaired does not necessarily imply that they are liable to repair the new part. The defendants argue that they are not so liable, because the added portion is not part of the immemorial bridge, and, at the same time, that the indictment varies from the fact, because, in charging them with repairs of the ancient bridge in general terms, it charges them with liability to repair the new part. So they treat the bridge as a whole for the purpose of variance, but not as a whole for the purpose of liability. The ancient immemorial bridge remains as it always was. If the new portion is no part of it, there is no addition of liability.

WILLIAMS, J. The witnesses in this case were parties to the indictment ; if a fine were imposed, they were liable to it. The question, whether an inhabitant was actually rated or not, has been deemed material  
 \*198] \*where his admissibility depended on his having an interest or no interest in the cause ; *Rex v. Kirdford*, 2 East, 559 : but here the admissibility depended on the witnesses being parties to the cause ; and to that point it was quite immaterial whether they were in fact included in a rate or not. As to the other objection, it is not denied that there was such a bridge as the indictment describes ; but it is argued that there was a bridge of that description, and something more. That does not negative the existence of an immemorial bridge, with the repair of which the defendants are charged ; and, the existence of such a bridge being admitted, the objection fails.

COLERIDGE, J. To apply stat. 3 & 4 Vict. c. 26, as the defendants have done would give it much too wide an effect. The first section renders persons competent as witnesses, who would otherwise have been disqualified by being rated or ratable ; the second makes a like provision for nominal parties to a trial, appeal or other proceeding ; but it does not affect actual parties. We all put this case upon the ground that the witnesses were substantially parties to the indictment. Then as to the indictment itself. The material allegation is, that there was an immemorial bridge, which the defendants were bound to repair ; and it was proved that an ancient bridge existed, to which some repairs had always been done by them. Either the whole of that bridge, including the added part, is still an ancient bridge, and the liability the same as before ; or the new part is severable, so that there is an ancient bridge and something else. Either state of things will support the allegation. There is no doubt that,  
 \*199] after conviction on \*this indictment, the defendants may have more difficulty than they would have otherwise have had in mak

ing out their exemption from liability as to the new part of the bridge, if they are exempt, on which point I will say nothing. But that amounts only to a greater difficulty on the evidence, and cannot vary the law.

Rule discharged.(a)

(a) See *Rex v. Lancashire*, 2 B. & Ad. 813; *Rex v. Devon*, 5 B. & Ad. 383.

### SHENTON v. JAMES.

A note was made in the following form. "On demand, I promise to pay W. S. 50*l.* in consideration of foregoing and forbearing an action in the Queen's Bench, for damages ascertained by consent to amount to that sum by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway."

*Held*, that the instrument appeared to be made on an executed consideration, and was a valid promissory note.

**ASSUMPSIT.** The declaration stated that defendant made his promissory note, and delivered the same to plaintiff, and thereby promised to pay plaintiff 50*l.* on demand. Plea, that defendant did not make the said promissory note, in manner and form, &c. Issue thereon.(a)

On the trial, before WILLIAMS, J., at the last summer assizes at Stafford, the instrument declared upon appeared to be as follows:—"17th December, 1843. On demand, I promise to pay to W. Shenton the sum of 50*l.* in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench for damages ascertained by consent to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway in the parish of Seighford. Thomas James." A verdict was \*found for the plaintiff, leave being reserved to move to enter a nonsuit on the point after stated. [\*200

*R. V. Richards* in this term(b) moved accordingly. This was only an agreement. It was not a promissory note, because the engagement to pay was not absolute: it was an agreement to pay, in consideration of the plaintiff's "foregoing," not of his having foregone, the action. *Clarke v. Percival*, 2 B. & Ad. 660, and *Horne v. Redfearn*, 4 New Ca. 433, show that such an instrument is not a note within stat. 3 & 4 Ann. c. 9, s. 1.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment as follows.

We think it clear that this was a promissory note on an executed and completed consideration, "foregoing and forbearing an action at law," "for damages ascertained by consent" to amount to 50*l.*, "by reason of the injury sustained," &c. All here is past: something has been done for which the damages are ascertained; and the note is given in consideration of foregoing an action. LITTLEDALE, J., said of the note in *Clarke v. Percival*, 2 B. & Ad. 660, "On the face of it, it is clear that it is not

(a) There were other pleas, not material. See a report of the case at nisi prius, *Shenton v. James*, 1 Carr. & Kirw. 136.

(b) November.2d. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, J.

payable at all events." Here the note clearly is so. Three at least of the judges, in that case, appear to have thought that the words did not amount to a promise at all. Here a distinct promise is given.

Rule refused.(a)

(a) See *Haigh v. Brooks*, 10 A. & E. 309; *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

\*201] \*The QUEEN v. The Inhabitants of CARTWORTH.

When the quarter sessions have granted a case, notice of the motion for a certiorari to bring up the orders must (by stat. 13 G. 2, c. 18, s. 5,) be served on two or more justices who were actually present at the sessions.

And, if the certiorari has issued on an affidavit showing that the notice was served on persons described in the affidavit as justices of the county, &c., for which the sessions were held, but not stated to have been at the sessions when the order was made, the writ will be quashed.

The court will not presume that every justice qualified to attend the quarter sessions was actually present there when any particular order was made.

On motion to quash the certiorari for the reason above stated, mere lapse of time, however long, since the writ issued, is no answer.

On appeal by the inhabitants of Cartworth, in the west riding of Yorkshire, against an order of removal, the sessions confirmed the order, subject to the opinion of this court upon a special case, which was stated, and the proceedings removed into the Queen's Bench by certiorari. The case standing in the crown paper for argument, *Pashley*, in this term, obtained a rule calling on the prosecutors of the writ to show cause why it should not be quashed. The ground of motion was, that notice did not appear to have been given, as required by stat. 13 G. 2, c. 18, s. 5, to two of the justices by whom the order of sessions was made.

It appeared that the certiorari was granted, May 7th, 1842, on an affidavit sworn, April 30th, by the attorney for the appellants, stating: "That, at the quarter sessions of the peace for the west riding of the county of York, held by adjournment at Wakefield, in and for the said riding, a certain appeal against an order made by two justices of the said riding touching the removal of," &c., "came on to be heard, and that, on such hearing, an order was made confirming the said order, but subject to a case for the opinion of her majesty's Court of Queen's Bench: and this deponent further saith that he did, on the 29th day of April instant, serve Thomas

\*202] Horncastle Marshall, Esquire, and that he also \*did, on the 30th day of April instant, serve John Sutcliffe, Esquire, two of her majesty's justices of the peace for the said riding, with two copies of the notice hereunto annexed, by delivering a copy of such notice to each of them the said T. H. M. and J. S. personally." The notice was as follows. "To John Sutcliffe and Thomas Horncastle Marshall, Esquires, two of her majesty's justices and keepers of the peace of the west riding of the county of York. Take notice that her majesty's Court of Queen's Bench

will be moved on the 7th day of May next, or as soon after as counsel can be heard, on behalf of the township of Cartworth, in the west riding of the county of York, that a writ of certiorari may be issued to remove into the said court a certain order made at the general quarter sessions of the peace held by adjournment at Wakefield in and for the said riding on the 5th day of January last, confirming a certain other order, made by two justices of the peace in and for the said riding, touching the removal of Matthew Wadsworth," &c., "from the township of Upperthong in the said riding to the said township of Cartworth, and in confirming which order a special case was reserved by the said court of quarter sessions for the opinion of her majesty's Court of Queen's Bench. Dated the 29th day of April, 1842. Stephenson Floyd, and Booth, Huddersfield, attorneys for the inhabitants of the said township of Cartworth." The certiorari (directed "to the keepers of our peace and our justices assigned to hear and determine," &c., "within the west riding of our county of York, and to every of them," and requiring a return by them or one of them immediately after receipt of the writ) was tested May 9th, 1842. A return was made, December 23d, 1842. The rule, \*calling upon the respondents to show cause why the order of removal and order of sessions should not be quashed, was obtained in Trinity term, (June 15th,) 1843, and was served on the respondents on 19th October, 1843. [\*203]

*Pickering* now showed cause. This objection cannot be taken so long after the issuing of the certiorari. *Rex v. Rattislaw*, 5 Dowl. P. C. 539; *Rex v. Nicholls*, (a) and *Rex v. Wakefield*, 1 Burr. 485, may be cited: but none of those cases is an authority for the motion after so long a delay. *PATTESON*, J., in the first cited case, 5 Dowl. P. C. 539, expressly disclaimed "deciding that in all cases such a motion may be made after any lapse of time." *Regina v. How*, 11 A. & E. 159, which may also be cited, shows only that an objection to the notice does not necessarily come too late after the rule for a certiorari has been enlarged by consent.

*Pashley*, contra, was called upon by the court as to this point. The rule to show cause why the orders should not be quashed was served only on the 19th of last October. If the notice of application for a certiorari was not served on the right justices, they have been strangers to the proceedings until the last month. No step had been taken by them in pursuance of the notice before the present motion. [Lord DENMAN, C. J. If the notice of certiorari was served upon wrong parties, the matter is open for ever.]

*Pickering*, in continuation. It may be admitted that the notice would have been insufficient if it had appeared, as in *Rex v. Rattislaw*, 5 Dowl. P. C. 539, that one of the \*justices served was, in fact, absent when the sessions made their order. In *Regina v. How*, 11 A. & E. 159, the appointment of overseers, which it was proposed to remove by certiorari, had been made by four justices, and the notice was served [\*204]

(a) Note (a) to *Rex v. The Justices of Glamorganshire*, 5 T. R. 200.

on justices of the same names, but not otherwise identified with the four whose appointment was questioned; and this was held an insufficient notice. But every justice of a county or riding may be presumed to be present at quarter sessions, though the same presumption may not extend to a petty session. In *Regina v. The Justices of Lancashire*, 11 A. & E. 144, 153, it was objected that Richard Gould, on whose behalf the notice of application for a certiorari purported to be given, was not shown by affidavit to be the person actually applying; but PARRESON, J., said "The justices might have shown, as cause for not granting a certiorari, that Gould was not the party really applying; and, if they had proved that, the writ could not have gone. As it is, notice sufficiently appears." The same answer may be given here.

*Pashley*, contra, relied upon *Rex v. Rattislaw*, 5 Dowl. P. C. 539, and *Rex v. Nicholls*, 5 T. R. 280, note (a), as showing that the motion to quash the certiorari was not too late. [Lord DENMAN, C. J. We are satisfied as to that.] The substantial objection in *Rex v. Rattislaw*, 5 Dowl. P. C. 539, was, that the prosecutor of the certiorari had not "duly proved upon oath," as stat. 13 G. 2, c. 18, s. 5, requires, that he had given six days notice to "the justice or justices" "by and before whom" the order had been made. That applies to the present case. *Regina v. How*, 11 A. & E. 159, is conclusive. Lord DENMAN, C. J., said there: "Nor do I find that the justices  
\*205] upon \*whom the notice is served are the justices who made the order. It is no answer that the end which the statute had in view will be attained: the objection made is, that the enactment of the statute is not complied with. I disclaim looking to any thing but what the statute requires." [COLERIDGE, J. It often happens that magistrates attend on the first day of the sessions, and are named in the caption, but are not present on subsequent days. Must it be shown that the magistrates served with notice were actually present when the order was made?] At least it should appear that they are magistrates named in the caption. The justices served with notice in this case may not even have been in the commission when the order was made.(a) The fact that the sessions had granted a case was no reason that the law as to notice of certiorari should not be strictly enforced; *Rex v. The Justices of Sussex*, 1 M. & S. 631, 734. And there is the more reason for it because, by the practice which has long prevailed, the rule for a certiorari is absolute in the first instance.

Lord DENMAN, C. J. We are satisfied that this rule must be made absolute. The only ground on which the notice could be supported must be the presumption that all the magistrates of the riding were present at the quarter sessions; but that is a fiction of law for which we cannot trace any authority beyond the argument of counsel. The caption in the present case does not pretend to assert that all were present.(b) Then it was

(a) See *Regina v. Martin*, note (a) to *Taylor v. Clemson*, 2 Q. B. 1037.

(b) It stated the sessions to have been holden "before the Hon. Edwin Lascelles, chairman, John Yorke, Esq., and others their fellows, justices," &c.

necessary that justices who actually were present should have been called upon to consider whether or not they \*would oppose the issuing of a certiorari. It is true that the sessions had granted a case: [\*206] but it is just possible that justices may wish to allege that no leave to state a case was really reserved; or that it was reserved on terms which have not been complied with; or other grounds of objection: and as to the probability of this we cannot draw any line. And I think the objection is still open, notwithstanding the lapse of time.

WILLIAMS, J. Looking to the language of the statute as well as to the reason of the thing, I am of opinion that the objection is valid. The purpose for which it is enacted, in stat. 13 G. 2, c. 18, s. 5, that notice shall be given to the justice or justices making the order is, "that such justice, or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such certiorari." I agree that this motion can be resisted only on the presumption of all the justices being present at the sessions; and for that there is no ground either in the caption or in fact; but the contrary assumption is the probable one.

COLERIDGE, J. I am of the same opinion, though I come to it with great reluctance. The enactment does not seem to have been framed in contemplation of matters arising at quarter sessions. In other proceedings, where the magistrates who act may individually be placed in peril, it is matter of substance that notice of the motion for a certiorari should be given to those who will be called upon to justify their proceedings. But, where the sessions have granted a special case, the notice is mere form. However, it is necessary on principle that the statute should be complied with; and that principle must govern our decision.

\*WIGHTMAN, J. It is not to be presumed that all the magistrates are present at the quarter sessions; and, if it were, the documents here do not show that the parties who received notice were magistrates when the order of sessions was made. Rule absolute.(a) [\*207]

(a) Two motions in this case were afterwards made in the Bail Court, for which see *Regina v. Inhabitants of Cartworth*, 1 Dowl. & Lowndes, 842. The following case, decided in the latter part of the term, is placed here to accompany *Regina v. Cartworth*.

### The QUEEN v. The Inhabitants of GILBERDIKE.

On motion to quash a certiorari removing an order of the Yorkshire east riding quarter sessions, it appeared that the writ was granted on affidavit that notice had been served (under stat. 13 G. 2, c. 18, s. 5,) on B. and F., who were stated in the affidavits to be justices of the riding, but were not sworn to have been present when the order was made.

Held, that the affidavits did not warrant the writ, and that the defect was not cured by

affidavits exhibited on showing cause, more than six calendar months after the order of sessions, that B. and F. were justices present at the making of the order. Writ quashed.

On appeal against an order of two justices removing William Brader, his wife and children, from the township of Yokefleet to the township of Gilberdike, both in the east riding of Yorkshire, the sessions, (April, 1843,) confirmed the order. The appellants, on September 30th, 1843,<sup>(a)</sup> obtained, by order of a judge, a certiorari to remove the order of sessions into this court. The notice of motion for a certiorari was addressed "to Richard Bethell, Esquire, and the Rev. Daniel Ferguson, two of her majesty's justices of the peace for the east riding of the county of York,"  
 \*208] and informed them that "a certiorari would be applied for before a judge to remove into this court "a certain order made at the general quarter sessions of the peace held at Beverley in and for the said riding on," &c., "confirming a certain order of removal," &c.; and that the court or a judge would afterwards be moved to quash the order. Affidavits of service of the notice were produced before the judge at chambers, stating that the deponents had personally served "Richard Bethell, Esquire, one of her majesty's justices of the peace for the east riding of the county of York," and "the Rev. Daniel Ferguson, one of her majesty's justices of the peace" for the same riding. The order (with other documents) having been returned in obedience to the writ, a rule was obtained in this term calling upon the prosecutors of the certiorari to show cause why it should not be quashed. One objection to the writ was, that the notice did not appear to have been served upon justices who were present when the order of sessions was made.

*Archbold* now showed cause on an affidavit, sworn this term, which stated that Mr. Bethell and Mr. Ferguson were two of the magistrates present at the hearing of the appeal.

*Baines* contra. *Regina v. The Justices of Shrewsbury and Salop*, 9 Dowl. P. C. 501,<sup>(b)</sup> and *Regina v. Cartworth*, ante, p. 201, are conclusive in favour of this application. The facts now alleged were not proved before the judge who granted the writ; and the materials for deciding on the application ought  
 \*209] to be complete when it is made: otherwise, defects in the "original proceedings for a certiorari might at any time be repaired by a subsequent affidavit. The writ was granted ex parte; the first opportunity, therefore, which the respondents have had to contest the proceedings was by this motion. [Lord DENMAN, C. J. I think this objection must prevail. If the six calendar months, stat. 13 G. 2, c. 18, s. 5, had not elapsed, the case might be different; but here the fact of notice to the

(a) A rule nisi was obtained in Trinity term for a certiorari to bring up the order of removal; but was discharged because six days' notice had not been given to one of the justices.

(b) This case appears to be the same as *Regina v. How*, 11 A. & E. 159, cited in *Regina v. Cartworth*, ante, pp. 203, 204.

proper justices is not brought before the court till more than six months after the order of sessions.] *Archbold*. It appeared on affidavit before the judge that Mr. Bethell and Mr. Ferguson, magistrates of the east riding, had been served with notice. And it is now proved that those magistrates were present when the sessions made their order. [COLERIDGE, J. You should have proved that to the satisfaction of the judge at chambers. Lord DENMAN, C. J. According to your argument, if the affidavits used at chambers had called them justices of Middlesex, you might now have shown that they were justices of the east riding.]

*Per Curiam.*(a)

Rule absolute.

(a) Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

\*The QUEEN v. The Inhabitants of BIRMINGHAM. [\*210

The rule, that a child within the age of nurture cannot be separated from the mother by order of removal, is established for the benefit of the child, and therefore cannot be dispensed with by the mother's consent.

A woman having children by a first marriage, born in parish B., married again; her husband was unable to maintain the children; and the family became chargeable to parish A. The mother consented, and wished, that the children, then in the workhouse of A., and being within the age of nurture, should be removed to their own parish: and two justices thereupon made an order for removing them to B., which the sessions on appeal confirmed, subject to a case. This court quashed the orders.

On appeal against an order of two justices, removing Harriet Atkins and Elizabeth Ann Atkins, children of James Atkins deceased, from the parish of Aston near Birmingham to the parish of Birmingham, both in the county of Warwick, the sessions confirmed the order, subject to the opinion of this court upon the following case.

The examination of Elizabeth Johns, on which the said order of removal was made, stated (so far as it is necessary to set forth the same) that, in August, 1834, she the said E. Johns intermarried at Edgbaston church with her late husband James Atkins, by whom she hath two children born in wedlock, namely the said Harriet Atkins, nearly seven years old, and Elizabeth Ann Atkins, about four and a half years old. That her said late husband died in December, 1837, and that in August, 1841, she intermarried with Joseph Johns her present husband, who is now out of employ and unable to support her and her children, and that they are all inmates of the workhouse, chargeable to the parish of Aston near Birmingham. And that she consents to the removal of her children from her, and wishes them to be sent to their parish. The order of removal described the children removed thereby as Harriet Atkins, nearly seven years old, and Elizabeth Ann Atkins, about four years and a half old, children of James Atkins deceased.

The grounds of appeal were as follows:—1. That \*the said order of removal is bad on the face thereof, and the same is in- [\*211

operative, because it removes the said children, H. Atkins and E. A. Atkins, and separates them from their mother E. Johns, and from her care and custody, such children being respectively within the age of nurture, as appears by the said order. 2. That the said order is bad and inoperative, because the children removed thereby cannot be removed without the consent of their said mother from her or from her care and custody. 6. That the said examination is bad because the said mother, E. Johns, has no power to consent to the removal of her said children and their separation from her. 7. That the said order and the examination on which the said order is made are bad, because the said H. Atkins and E. A. Atkins are thereby separated from their mother E. Johns, and removed from her care and custody.

On the hearing of the appeal, it was admitted that the legal settlement of the said H. Atkins and E. A. Atkins was, at the time of the making of the said order, in the parish of Birmingham; but it was objected for the appellants that the said children, H. Atkins and E. A. Atkins, being within the age of nurture, could not be separated from their mother by an order of removal even with her consent. The Court of Quarter Sessions were of opinion that the children, although within the age of nurture, might be removed to their own parish, and separated from their mother, by her consent, and confirmed the said order, subject to the opinion of the Court of Queen's Bench on this point.

If this court should be of opinion that the decision of the Court of Quarter Sessions was incorrect on this point, then the order of removal was to be quashed; if otherwise, the said order to be confirmed.

\*212] *W. T. S. Daniel and Mellor*, in support of the order of sessions. The question will be whether there is an imperative general rule prohibiting the removal of children within the age of nurture apart from their mother, although the mother consents. This comes before the court as a question merely upon jurisdiction, since the consent may be given for sufficient reasons, and for the evident benefit of the children. It may be that the law will in no case separate children of tender age from the mother without her consent; but, she consenting, all reason for the objection ceases. In *Skeffreth v. Walford*, 2 Sess. Ca. 89; S. C., 2 Bott. 3, pl. 11, 6th ed., which will be relied upon for the supposed general rule, the order removed a child two years old from the mother; and the argument which prevailed was that, it "being a nurse-child," the justices "cannot separate it from the mother by reason of the care necessary to nurture so very young a child, which none can be supposed so fit to administer as the mother of it." The questions of consent, and expediency of separation under possible circumstances, were not considered. [COLERIDGE, J., referred to stat. 4 & 5 W. 4, c. 76, s. 57.] The effect of that clause is that, if a woman having a child marries, the husband shall be liable to maintain it as a part of his family till it attains the age of sixteen, or till the woman's death; but it was held in *Regina v. Wendron*, 7 A. & E. 819, that, if the

mother has separated herself from the child, it must be sent, though under the age of sixteen, to the place of its own settlement, wherever that may be. The dates in that case show that the child must have been within the age of nurture. In *Rex v. Bennett*, 2 B. & Ad. 712, where it was held, as the consequence of stat. 59 G. 3, c. 12, s. 33, that the \*mother, an Irishwoman, must be removed to Ireland, but her child, though [\*213 within the age of nurture, remain in England, where its birth settlement was, the court stated as an argument against such a decision that "there may certainly be great inconvenience" in separating the mother and child; but not that the common law forbids it. And in 4 Chitty's Burn. 419, c. vi. s. II. ii. 3,(a) after noticing the general rule that a nurse child shall not be separated from its mother, it is said that "the reason upon which this rule is founded does not apply if the mother voluntarily desert her child; and in that case it may be sent to its place of settlement." The precedent in 4 Chitty's Burn, 1073, ed. 28 was cited. Appendix, 3, of an order on parish officers for maintenance of a child settled with them but residing with its mother in a different parish for nurture, recites a deposition of M. B., the mother, that the child is a bastard and chargeable, &c., "and that she the said M. B. is not willing to part with her said child until he attains the age of seven years;" which implies an option in the mother. So in stat. 22 G. 3, c. 83, s. 30, which makes certain regulations for the placing of poor children in workhouses, or elsewhere under proper care, it is provided "that nothing herein contained shall give any power to separate any child or children, under the age of seven years, from his, her, or their parent or parents, without the consent of such parent or parents;" thus recognising, by implication, the authority of the parent or parents to permit such separation. The mother is a fit judge whether or not the separation will be beneficial to the child. [COLERIDGE, J. Suppose the child were \*removed; could the mother demand the child back again? In [\*214 ordinary cases, returning after removal is an offence. Lord DENMAN, C. J. If the parent's will gives jurisdiction to remove, would the revocation of that will give jurisdiction to remove back?] Perhaps it might. The case has never arisen. [Lord DENMAN, C. J. The question whether, to make the order binding, the mother's will must continue bears directly upon the nature of the jurisdiction.]

*G. Hayes* (with whom was *Spooner*) contra. The question is whether, by supposed consent of the mother, a child of any age, from seven years to the very day of birth, may be separated from her. There is no necessity for it, because, if the child is living with the mother in a different parish from that of its birth, an order for its maintenance may be made upon the place of birth; *Shermanbury v. Bolney*, Carth. 279. It is argued that separation may be best for the child: but the general presumption must be that the best place for a child is that in which it can have the care of its

(a) 29th ed., where *Regina v. Wendron*, 7 A. & E. 819, is cited. The 28th edition was referred to in the argument.

mother. The removal must increase the expense, because some person must be paid to supply the mother's place. The rule that a child within the age of nurture shall be irremovable from the mother is not founded on the mother's will, but on the necessities of the child. The objection in *Skeffreth v. Walford*, 2 Sess. Ca. 89 ; S. C., 2 Bott. 3, pl. 11, 6th ed, was, that the child, being a nurse child, could not be separated from the mother, "by reason of the care necessary to nurture so very young a child, which none can be supposed so fit to administer as the mother." She, therefore, cannot waive the rule ; and the child, of course, cannot. The rule, that a child under seven years of age must remain with the mother, and the

\*215] \*object of that rule, namely that the child may receive proper care and nurture, appear also from *Wrangford v. Brandon*, Carth. 449 ; *Rex v. Saxmundham*, Fort. 307 ; S. C., 2 Bott. 16, pl. 35 ; *Rex v. Hemlington*, Cald. 6 ; S. C., note (2) to *Simpson v. Johnson*, 1 Doug. 9 ; *Rex v. St. Giles in the Fields*, Burr. S. C. 2. As to the cases cited on the other side, *Rex v. Bennett*, 2 B. & Ad. 712, turned upon peculiar circumstances. [Lord DENMAN, C. J. There an express provision for the case had been made by statute.] The law gave no power to remove the child. [COLERIDGE, J. And it compelled the removal of the mother.] In the present case a consent by the mother is alleged ; but a married woman is not a free agent ; and, if she could give a consent, a further objection would be that she could not revoke it if the child were ill treated. In *Rex v. Wendron* 7 A. & E. 819, the mother had in fact abandoned the child ; and the parish removed it to the only place which by law was bound to receive it. [He was then stopped by the court.]

Lord DENMAN, C. J. It is true that some cases have arisen under statutes, in which it has become necessary to break in upon a rule, established not for the mother's benefit but for the protection of the child, that they shall not be separated during the age of nurture. Here no such necessity exists : and we ought to crush the attempt to break through a rule which the judges in all times have uniformly regarded as binding. The order of sessions must be quashed.

WILLIAMS, J. As to the suggestion of consent ; the rule is established for the benefit of the child, and therefore the consent of the mother cannot operate against it.

\*216] \*COLERIDGE, J. The rule applies to all ages from the earliest to seven years. If the doctrine now contended for were to prevail, the consequence might be that a child one week old might be removed from its mother, by an alleged consent, to a distant part of the country. I agree that the object of the rule is the benefit of the child. And here the mother is a married woman, whose consent would not be valid as to the meanest article of property.

WIGHTMAN, J. I am of the same opinion, because it appears to me that the rule is established for the protection of the child.

Orders quashed.

The QUEEN v. The Inhabitants of SOUTH KILVINGTON.

Pauper occupied premises at a yearly rent, under an agreement by which the landlord was to pay all rates. The rent was higher on that account than it would otherwise have been. Pauper was assessed to the poor as the occupier; but the landlord always paid the rate. *Held*, that the pauper did not gain a settlement by being charged with or assessed to, and paying, the poor rate, under stat. 4 W. & M. c. 11, s. 6, or stat. 4 & 5 W. 4, c. 76, s. 66.

On appeal against an order of two justices removing Thomas Gallantree, his wife and children, from the township of South Kilvington to the township of Newsham with Breckenborough, both in the north riding of Yorkshire, the sessions quashed the order, subject to the opinion of this court upon the following case.

In January, 1840, the pauper, who had previously gained a settlement in the township of Newsham with Breckenborough, took a cottage, being a separate and distinct dwelling-house, in the township of South Kilvington, of a Mr. West, at the annual rent of 5*l*. Nothing was said about the rates with respect to the cottage; for \*which, in two several rates made for the relief of the poor, on the 12th of November, 1840, and the 22d day of February, 1841, the pauper was rated at the sum of 2*s*. 9*d*., being in each instance a rate of 1*s*. in the pound on the sum of 2*l*. 15*s*., being the amount at which, in each of the said rates, the cottage was assessed; both of which rates the pauper paid at Candlemas, 1841. [\*217

Mr. West let the pauper a field containing 3 acres 3 roods of land in the said township of South Kilvington upon the terms following. The land was taken from year to year; the rent was 14*l*. 14*s*. a year; and the landlord was to pay the rates and all that came against it. The rent at which the pauper agreed to take the field was a higher rent because the landlord was to pay the rates and all that came against it. The pauper actually occupied the field together with the cottage from Candlemas, 1841 until August, 1842, at the rent of 19*l*. 14*s*. a year; and during this period he paid his landlord the whole rent, and was rated and charged in respect of the field and cottage as follows.

Date of Rate.	Name of Occup't.	Name of Owner.	Description of Property.	Number of Acres.	Amount at which Property is assessed.	Amount of Rate to be collected.	Am't in the Pound.
16th June, 1841.	Gallantree, Thos.	West, W., Esq.	House & land.	3 3	£ s. d. 10 12 0	s. d. 7 11½	d. 0
24 Jan. 1842.	Gallantree, Thos.	West, W., Esq.	House & land.	3 3	10 12 0	8 0½	0½
23d June, 1842.	Gallantree, Thos.	West, W., Esq.	House & land.	3 3	10 12 0	5 4	0

The overseer of the poor of the township of South Kilvington called upon the pauper and demanded 7*s*. 11½*d*., the first of these rates. The pauper paid 2*s*., being 9*d*. in the pound on 2*l*. 15*s*., the amount for which he was assessed for the cottage before he took the land, and referred the

overseer to the landlord, Mr. West for the rest, who thereupon, in pursuance of his agreement, paid the remaining 5s. 11½d., being also 9d. in the pound  
 \*218] on the 7l. 17s. 9d., the residue of 10l. 12s. 9d., at which the house and land were assessed: and of the remaining rates of 8s. 0½d. and 5s. 4d. the tenant respectively paid 2s. and 1s. 4½d., being in one instance a rate of 9½d., and in the other instance a rate of 6d. in the pound, on 2l. 15s. the amount above described as that at which the cottage was assessed before he took the land; and the landlord, in pursuance of his agreement, paid the remainder, the overseer always, after the above-mentioned reference by the pauper to Mr. West, applying to him for the rates due in respect of that land. The pauper resided in the township during the whole period of his occupation of the land.

By their statement of grounds of appeal, the appellants relied, not only on a renting of a tenement by the pauper within the respondent township, sufficient to give him a settlement there, but also that he had gained a settlement therein by having, in the years 1841 and 1842, been charged with, and having paid, his share towards the public taxes or levies of the said township of South Kilvington: and the only question disputed between the parties was, whether upon the above facts it could be said that the pauper had paid the poor rate for a year during his occupation of the land, so as to satisfy the 66th section of stat. 4 & 5 W. 4, c. 76, or whether he had been charged with and paid his share towards the poor rate under stat. 3 & 4 W. & M. c. 11, s. 6. The Court of Quarter Sessions held that the payment of the poor's rate by the landlord in consequence of the agreement between him and the pauper was a payment by the latter sufficient to satisfy either of the statutes, and quashed the order of removal.

\*219] The question for the opinion of this court was: \*whether such payment was sufficient under either of those statutes. If this court should be of opinion that it was, then the order of sessions was to be confirmed; but, if it should be of opinion that it was not sufficient, then the order of sessions to be quashed.

*Bliss* and *Wharton*, in support of the order of sessions. The pauper was "charged with and" did "pay his share towards the public taxes or levies" of the township within stat. 3 & 4 W. & M. c. 11, s. 6, and was "assessed to the poor's rate, and" "paid the same" within stat. 4 & 5 W. 4, c. 76, s. 66. *Rex v. Weobly*, 2 East, 68, will be cited on the other side, but differs from this case. There the pauper resided in the respondent parish as an officer of excise, and was rated there to the land tax for his salary; but he never paid that or any rate himself, "the same being paid by the collector of excise, and not deducted out of the pauper's salary;" and it was held that he gained no settlement: but Lord *KENYON*'s observation was: "If the rate had been paid by him through the medium or by the hands of another, that would have been a payment by himself; but here he neither paid it mediately or immediately. He was not affected by the payment at all. In the present case the pauper was

the person liable to the rate and charged, but made a contract with his landlord for the payment of it by him. He, in effect, appointed a deputy for that purpose, as if a man should leave an order at his banker's for the payment of a periodical sum there. In *Rex v. Bridgewater*, 3 T. R. 550, the land tax being demanded at the house of the party charged, who had absconded, and the collector being about to seize his goods, one of his daughters \*prevailed upon a friend to pay the money; and this [\*220 was held a payment by the father. [Lord DENMAN, C. J. It was as if he had borrowed the money and paid it over.] Nothing, under the statutes in question, requires the rates to be paid personally. Serving an office, and the payment of public taxes or levies, are substituted, by stat. 3 & 4 W. & M. c. 11, s. 6, as requisites to a settlement, for the notice prescribed by the same statute, s. 3. Executing an office by deputy was held sufficient for gaining a settlement, in *Rex v. Hope Mansell*, Cald. 252; and in *Rex v. Oakhampton*, Burr. S. C. 5, a tide-waiter rated to the land tax for his salary, and paying it, was held to have paid public taxes and levies within the statute, though the amount was repaid him by the collector of customs. *Rex v. Armouth*, 8 East, 383, was a similar decision; and Lord ELLENBOROUGH there observes: "The case of *The King v. Weobly*, 2 East, 68, was distinguished from the other cases by Lord KENYON, because there the officer did not pay the tax mediately or immediately; and, as he says afterwards, because the pauper neither in fact paid the rate himself, nor constructively by the hands of his agent." The proviso in the parliamentary reform act, 2 & 3 W. 4, c. 45, s. 27, making payment of rates a necessary qualification for voting in cities and boroughs, has always been construed in the manner now contended for by the appellants. The decision against the right of parties to be enrolled as burgesses under stat. 5 & 6 W. 4, c. 76, s. 9, in *Regina v. The Mayor of Bridgnorth*, 10 A. & E. 66, did not proceed on the ground merely that the claimants had not paid the rate with their own hands, but that the \*payment was not their act, nor authorized by them. If the legis- [\*221 lature had intended that the payment should be the personal act of the party whose settlement is in question, the word "personally" would have been used; or "actually," as in stat. 1 W. 4, c. 18, s. 1; the effect of which word is pointed out by the court in *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219. The present case is the same as if the pauper had not paid an increased rent, and had allowed a yearly sum to a friend, to discharge the rates for him. That the person by whose hand the rates were paid was landlord of the premises could make no difference: the landlord, as such, was not liable to the rates more than any other person whom the pauper might have engaged to pay them.

*W. H. Watson and Archbold*, contra. This was not a sufficient payment of rates. By stat. 3 & 4 W. & M. c. 11, s. 6, the pauper should have been charged with, and paid, the rates; by stat. 4 & 5 W. 4, c. 76, s. 66, he should have been assessed to the poor rate and paid the same. The

pauper did not fulfil either requisition. *Rex v. Weobly*, 2 East, 68, decides this case. The landlord here did not pay as the pauper's agent, but was himself bound to pay by his agreement. [Lord DENMAN, C. J. That was as between himself and the tenant. If he did not pay, the tenant was liable.] He did not pay for the tenant. In *Rex v. Bridgwater*, 3 T. R. 550, the person who paid the land tax did so as the immediate agent of the householder: it may indeed be said that he paid it himself; for the money, when borrowed for him, became his. In \**Rex v. Oakhampton*,  
 \*222] Burr. S. C. 5, and *Rex v. Armouth*, 8 East, 383, the officer himself paid the rate, though he was reimbursed; those decisions show that, for the purpose of stat. 3 & 4 W. & M. c. 11, s. 6, the party who personally discharged the rate was looked to. Where the settlement has depended on payment of rent, under stat. 1 W. 4, c. 18, s. 1, it has been held that creating a fund out of which the rent was paid not by the tenant but by another person, was not sufficient; *Rex v. Pakefield*, 4 A. & E. 612; *Regina v. Melsonby*, 12 A. & E. 687. The decisive objection in *Rex v. Weobly*, 2 East, 68, was that, although the pauper's land tax was paid, he himself "neither paid it mediately or immediately." So, here, the moneys paid were not those of the pauper; and the landlord paid them, not on the pauper's account, but on his own. [*Archbold* was stopped by the court.]

Lord DENMAN, C. J. Whatever may be the effect of such a payment as this in any other case, *Rex v. Weobly*, 2 East, 68, makes it clear that a settlement is not gained by it. The order of sessions must be quashed.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Order of sessions quashed.(a)

(a) See *Rex v. Lower Heyford*, 1 B. & Ad. 75; *Wright v. The Town Clerk of Stockport*, 5 Man. & G. 33; *Hughes v. Overseers of Chatham*, 5 Man. & G. 54.

\*223] \*DOE on the demise of WILLIAM BILLS and ELIZABETH BILLS his wife, and of the said ELIZABETH BILLS, v. PHILIP KENT HOPKINSON.

A., being seised in fee of lands, devised them to her two grandsons T. and W., during their natural lives, in equal moieties, and, after their decease, the moiety of T. "to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her or his heirs and assigns for ever, to take in equal shares, if more than one:" with a similar limitation as to W.'s moiety. In case either T. or W. should "happen to depart this life without lawful issue," B. gave the moiety of the grandson so departing to the survivor, and to her other grandson J., during their lives, "and, after their decease, the same to go to their lawful issue in equal moieties and shares, and to their, such lawful issue's, heirs, and assigns for ever:" and, in case it should happen that both T. and W. should depart this life, and neither of them should leave any lawful issue, B. gave the whole to J. for life, "and, after his decease, to such child or children as he shall leave, lawful issue, at the time of his decease, and to their, his or her heirs and assigns for ever, to take in equal shares, if more than one." In case it should happen that all three, T., W., and J., "shall de-

part this life without lawful issue, or if they or any of them shall leave lawful issue and such issue shall depart this life under the age of twenty-one years and without lawful issue," then S. gave the whole to her sisters E. and A., and their heirs and assigns for ever, as tenants in common.

T. and W., the grandsons, both survived S. After S.'s death, and before the death of T. or W., a daughter of T. was born, who survived him. After her birth T. and W. suffered a recovery.

*Held*, that the daughter, on her birth, took a vested remainder, liable only to open and let in the interests of after born children, which remainder was not therefore barred by the recovery.

**EJECTMENT** for a messuage and premises situate in the parish of Tyd St. Mary, in the county of Lincoln. On the trial, before Lord ABINGER, C. B., at the Lincolnshire spring assizes, 1842, a verdict was found for the lessors of the plaintiff, subject to the opinion of this court on the following case.

Sarah Skelton, being seised in fee of the premises in question, by her will, dated 26th February, 1836, duly executed, &c., devised as follows.

"I give and devise my house and lands, and all my real estate whatsoever, in Tyd St. Mary and Sutton St. Edmunds, or elsewhere, with the appurtenances, unto my two grandsons, Thomas and William Hopkinson, during their natural lives, in equal moieties or shares: \*and, after their decease, I give the moiety of the said Thomas of and in such my real estates to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her or his heirs and assigns for ever, to take in equal shares, if more than one: and my said grandson William's moiety I give to such child or children as he shall happen to leave living, lawful issue, at the time of his decease, and to their, his or her heirs and assigns for ever, to take in equal shares, if more than one. But, in case either of them my said two grandsons shall happen to depart this life without lawful issue, then I give the share or moiety of such grandson, so dying, to the survivor of them two, and to my other grandson John Hopkinson, during their lives: and, after their decease, the same to go to their lawful issue in equal moieties and shares, and to their, such lawful issue's, heirs and assigns for ever. And, in case it shall happen that both of them my said two grandsons Thomas and William Hopkinson shall depart this life, and neither of them shall leave any lawful issue, then and in such case I give and devise the whole of my said house, lands, premises and real estate unto my said grandson John for his life, and, after his decease, to such child or children as he shall leave, lawful issue, at the time of his decease, and to their, his or her heirs and assigns for ever, to take in equal shares, if more than one. And, in case that it shall happen that all three of them my grandsons shall depart this life without lawful issue, or if they or any of them shall leave lawful issue and such issue shall depart this life under the age of twenty-one years and without lawful issue, then I give and devise all such my dwelling-house, lands and premises, with appurtenances, unto \*my two sisters, Elizabeth Drury, of Messingham, and Ann Slingsby, of Ferry, [\*224 [\*225

and to their heirs and assigns for ever, as tenants in common: and, in case it happens that both or either of them, my said sisters, shall die before me, I direct that, notwithstanding, the same estate shall go to their or her heirs for ever."

The testatrix continued to be, and died, seised of the premises in question, on 8th October, 1816, leaving her two grandsons, William and Thomas Hopkinson, her surviving, the said William Hopkinson being her eldest grandson and heir at law. The said Thomas Hopkinson married on 29th November, 1813: he had issue a daughter Abigail Skelton Hopkinson, born on 3d October, 1814. On the decease of the said testatrix there was living the said Abigail Skelton Hopkinson, who died an infant and unmarried in June, 1821. On 17th February, 1818, there was born another daughter of the said Thomas Hopkinson, namely Elizabeth, who on 21st April, 1841, married William Bills, and was the lessor of the plaintiff.

In Trinity term, 1827, a recovery with double voucher of the said hereditaments, for the recovery of which this action is brought, was duly suffered by the said Thomas Hopkinson and William Hopkinson his co-devisee; the latter of whom was also, as above stated, the said testatrix's heir at law. This recovery was suffered in pursuance of an agreement contained in certain indentures of lease and release, bearing date respectively 20th and 21st June, 1827, to which the said Thomas and William Hopkinson (the said William being therein described as the heir at law of the said testatrix) were, with other persons, respectively parties: by which it is recited that the said William Hopkinson and Thomas Hopkinson \*were desirous of joining together in suffering a common  
 \*226] recovery of the said hereditaments, in order to defeat, bar and destroy all estates tail and contingent remainders therein, created by the will of the said Sarah Skelton, and for settling and assuring the same hereditaments to the several uses thereafter declared concerning the same respectively.

The said Thomas Hopkinson died on 1st June, 1828, without other issue, leaving the said Elizabeth Bills, his only daughter, him surviving, but having devised all his estates to his second wife, whom he left surviving. On 11th November, 1841, a formal entry was made upon the premises by the lessors of the plaintiff for the purpose of avoiding the operation of the recovery.

The question for the opinion of the court was, whether the lessors of the plaintiff are entitled to recover.

*B. Andrews* for the plaintiff.(a) The plaintiff is entitled to judgment unless the recovery barred the remainder devised to the child or children of Thomas Hopkinson: and this it could not do unless Thomas Hopkinson took an estate tail, or unless the remainder to his child or children

(a) The case was argued before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js. The argument for the plaintiff was heard on 1st November; that for the defendant, and the reply, on this day.

was contingent. First, Thomas Hopkinson did not take an estate tail, but only an estate for life. The limitation is expressly for his natural life. The life estates of Thomas could not unite with the remainder to his children, for the rule in *Shelley's Case*, 1 Rep. 93 b, 104 a, does not apply, "child" being (except under particular \*circumstances, not existing here) a word of purchase, not of inheritance: and, [\*227 further, the children of each are to take in equal shares, by the words of the limitation. Even the word "issue" is a word of purchase, where words of limitation are engrafted upon it; *Luddington v. Kime*, 1 Lc. Raym. 203; *Goodright, Lessee of Docking, v. Dunham*, 1 Doug. 264, *Doe dem. Comberbach v. Perryn*, 3 T. R. 484; *Right dem. Shortridge v. Creber*, 5 B. & C. 866. Secondly, the remainder was not contingent. It is true that, till the birth of a child of Thomas, it was uncertain whether the remainder could take effect: but, as soon as a child was born, the remainder was vested in such child, liable however to open and let in the interest of any subsequently born child. That construction was given, in the cases already cited, *Doe dem. Comberbach v. Perryn*, 3 T. R. 484, and *Right dem. Shortridge v. Creber*, 5 B. & C. 866, to devises much resembling the present, where the intent was collected, as it must be here, from the whole of the wills. The remarks of BAYLEY, J., in the case last mentioned, are applicable here. It must be contended, on the other side, that the remainder continued in suspense till the death of Thomas. But such a construction would defeat the whole intent of the devisor. If Thomas had several children, all of whom died in his lifetime but left issue who survived him, then, according to the defendant's construction, the remainder would not take effect in favour of such issue: and, if this happened also in the case of William and John, the remainders, in all the property, would go to the sisters of the devisor, though it appears that this is to happen only if all the three grandsons "shall depart this life without lawful \*issue, or if they or any of them shall leave lawful issue and such issue shall depart this life under the age of twenty-one [\*228 years and without lawful issue." Some stress will perhaps be laid upon the words, in the remainder to Thomas's children, "as he shall happen to leave" "at the time of his decease." But the whole will must be looked at: and it is impossible to suppose that Thomas and his children were to take interests different in kind from those of William and John and their children: yet, in the event of Thomas dying without children, his moiety is to go to William and John for life, and, after their deaths, to their *lawful issue* generally, which clearly would give a remainder vested in the issue as soon as it was born. Words having as strong an aspect of contingency as these have been held to give vested estates, as in *Webb v. Hearing*, Cro. Ja. 415, 416, (3d point;) *Bromfield v. Crowder*, 1 New R. 313; *Doe dem. Roake v. Nowell*, 1 M. & S. 327.(a)

(a) See a case on the same devise, in Dom. Proc. *Randall v. Doe dem. Roake*, 5 Dow. 205. Also *Doe dem. Dolley v. Ward*, 9 A. & E. 582.

! Sir *W. W. Follett*, solicitor-general, contra. This was an estate tail if it was not a contingent remainder. The latter, however, is clearly the true construction. The contingency is as to the persons who are to take. The remainder is devised, not to the child or children of Thomas generally, but to such as he shall happen to leave at his decease. Therefore, if he had a child whom he did not leave living at his decease, that child would not take at all: yet, according to the construction suggested on the other side, such a child, before Thomas's death, would have had a vested interest, and might \*have disposed of it. As to the expression "without lawful issue," in the description of the event in which the land is to go to the sisters, it clearly means such lawful issue as has been before designated, namely, a child or children living at the death of the tenant for life; if not, the limitation would be on an indefinite failure of issue. The cases cited are inapplicable. In *Doe dem. Comberbach v. Perryn*, 3 T. R. 484, and *Right dem. Shortridge v. Creber*, 5 B. & C. 866, the remainders were limited to the children generally, and not confined, as here, to such as should be living at the death of the tenant for life. It will be found that, where words of contingency have been construed as giving vested estates, the apparent uncertainty has been as to the event; here the uncertainty is as to the party to take. That explains *Bromfield v. Crowder*, 1 N. R. 313, and *Doe dem. Roake v. Nowell*, 1 M. & S. 327: the argument in the former case turned on the meaning of the word "if." In *Luddington v. Kime*, 1 Ld. Raym. 203, and *Doe dem. Brown v. Holme*, 2 W. Bl. 777, the remainders were held to be contingent. [COLERIDGE, J. Have not both those decisions been questioned?] It has been doubted, and justly, whether there were not estates tail in those cases: but no objection has been made to the decision that the remainders, if remainders at all, were contingent and not vested.

*B. Andrews* in reply. In *Doe dem. Brown v. Holme*, 2 W. Bl. 777, the uncertainty was whether heirs male or female should take.

*Cur. adv. vult.*

\*230] \*Lord DENMAN, C. J., in the vacation after this term, (December 5th,) delivered the judgment of the court.

The question in this case arose on a devise in the will of Sarah Sketton. After a devise of a life interest to her two grandsons, Thomas and William Hopkinson, in equal moieties, the will proceeds thus. "And after their decease, I give the moiety of the said Thomas of and in such my real estates to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her or his heirs and assigns for ever, to take in equal shares, if more than one." The testatrix died in October, 1816, leaving William and Thomas surviving. At her death Thomas had one daughter, who died unmarried in 1821. In February, 1818, Elizabeth, another daughter of Thomas, and the lessor of the plaintiff, was born. In Trinity term, 1827, the two brothers suf-

ferred a recovery, with double voucher, of the lands devised, in order to defeat all estates tail and contingent remainders therein, created by the will of Sarah Skelton. Thomas died in 1828, having disposed of all his estates; and a formal entry was made in November, 1841, to avoid the operation of the recovery. The question was agreed to be, whether the remainder to the children of Thomas was contingent until his death, or vested on the birth of one, with a liability to open and let in any after born child. This latter construction was contended for by the lessors of the plaintiff; and, if it be the correct one, it is admitted the recovery has not barred her estate. If the will had stopped with the devise above stated, it would have been impossible to resist the clear effect of the words. Nothing then could have vested till at least the decease of Thomas. But it is a well known and most sound rule, that we must give effect \*to the intention of a testator, and seek to find it in each part of his will by reference to the whole. Now, looking to the whole will, the intention of the testatrix is quite clear. Thomas and William, and their lawful issue and the heirs of them, were the first objects of her bounty in their respective moieties. If either Thomas or William should die without issue, John (another grandson) was to be substituted in all respects as to the moiety of him so dying. And, if both Thomas and William should die, neither of them leaving issue, the whole was to go to John for a similar estate. If all three should die without lawful issue, or, they leaving lawful issue, such issue should die under twenty-one and without lawful issue, then the estate was to go over to the two sisters of the testatrix in fee. This being the general intention, and it being admitted on both sides that the words are such as make the estates of the first takers estates for life only, we cannot but see that the construction of the defendant's counsel goes to defeat it in almost every link in the chain. According to this, Thomas might have issue who should die in his lifetime leaving issue, and yet his moiety may go over to John, and such issue would be barred. What is true of Thomas alone, will be so of Thomas and William and John,—the remoter object in the mind of the testatrix will come in with his issue to the whole, to the exclusion of the descendants of the two who are nearer. Nay, it may happen that the descendants of the sisters, who were evidently intended not to take unless the whole lineal stock is exhausted, may come in while the grandchildren of Thomas and William are in being, and this though the estates to the sisters are expressly given in case it shall happen “that all three of them my \*grandsons shall depart this life without lawful issue, or if they or any of them shall leave lawful issue and such issue shall depart this life under the age of twenty-one years and without lawful issue.” If we understand the words in the sense given them by the plaintiff's counsel, these inconsistencies will be avoided. The estate of each child will vest at its birth, and open to let in after born children. Many cases were cited in the

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[\*232]

argument, but none precisely in point: it is, therefore, unnecessary to examine them here in detail. We consider this will on its own particular limitations, and by the application of familiar principles. Our judgment, therefore, is for the lessor of the plaintiff.

Judgment for the plaintiff.(a)

(a) See *Fasting v. Allen*, 12 M. & W. 279.

## \*HALL v. BAINBRIDGE and ENDERBY.

[\*233]

**Declaration**, in assumpsit, recited that plaintiff was patentee of certain improvements in the steam-engine; that a company had contracted for building a steam vessel and fixing steam-engines on board of it; that plaintiff agreed with defendant that it should be lawful for the company to make, construct, or manufacture or use, the said steam-engines on the principle of the patent, and also to make, construct, or manufacture and use, on board any other vessels thereafter to be purchased or built by the company, steam-engines on the principle of the patent; and, in consideration of the premises, defendant agreed to pay to plaintiff 1000*l*. on 1st August, 1837, and 1000*l*. on 1st July, 1838, and also 5*l*. per horse power for every engine which should thereafter be made, constructed, or manufactured and used, on board any other vessel thereafter to be purchased or built by the company, in which the principle should be used, *to be paid on the signing of or entering into to the contract* for the manufacturing or purchasing such engine: and it was agreed that the arrangements of the apparatus, and the manner of construction and application, should be subject to the approbation of plaintiff, who might at his own expense employ an agent to superintend the application; and that no application or alteration of the apparatus should be made without being first approved of by plaintiff: and plaintiff agreed to furnish, at his own expense, all necessary drawings, and also, at the expense of the company's engineers, any part of the apparatus which the engineers might require. The count stated that the company afterwards contracted with F. for the manufacturing by F. of two engines of 550 horse power, to be used on board a vessel built by the company after the agreement was made, in which engines the principle of the patent was to be used: and, *on entering into the contract*, defendants became liable to pay to plaintiff 2,750*l*. Breach, non-payment thereof.

**Plea.** That, after the making the contract, and before the principle of the invention had been used by the company or F. in manufacturing the said two engines, the company and F. rescinded so much of the contract as related to the principle, and the principle never was used in manufacturing the said two engines; and that the plaintiff never employed any servant to superintend, &c., nor made nor was required to make drawings or apparatus, nor incurred any labour or expense, in respect to the said engines.

**Held** bad, on general demurrer; because the actual use of the principle was not the consideration for, or condition precedent to, the payment, and the liability to pay accrued upon the company making the contract with F., and could not be afterwards got rid of by the non-user.

**ASSUMPSIT.** The declaration alleged that, whereas plaintiff, before and at the time of the making the agreement and promise of defendants after mentioned, to wit 22d December, 1831, had invented an improved piston and valve for steam, gas and other engines, also an improved method, &c., (describing other improvements,) and plaintiff was the first and true inventor thereof, &c., and whereas, before the making the promise, &c., to wit on the day and year last aforesaid, the late King William IV. did, by his letters patent, &c., (alleging a grant of a patent to plaintiff, his executors, \*administrators and assigns, giving the sole privilege, &c., to them, by himself and themselves, or by his and their deputy and deputies, servants or agents, or such others as plaintiff, his executors, administrators and assigns, should at any time agree with, to make, use, &c., his said invention, in England, Wales, Berwick-upon-Tweed, and the colonies and plantations, for fourteen years from the date;) and whereas also, before and at the time of the making of the agreement, &c., to wit

9th January, 1833, &c., (description of other improvements, and similar grants of patents for them from William IV., and also patents for certain inventions of plaintiff granted by the president of the United States of America;) and whereas also, before the making of the agreement, &c., a company of persons using the name and description of The British and American Steam Navigation Company, to wit on 26th November, 1836, had contracted for the building of a new steam ship or vessel, and had also contracted for the construction and fixing of a pair of steam-engines on board the said steam ship or vessel; and thereupon heretofore, to wit 28th November, 1836, by a certain agreement then made between plaintiff and defendants, plaintiff agreed with defendants that it should be lawful for the said company thenceforth, during the terms for which the said letters patent or any of them were respectively granted, or during the period of any renewal or renewals of the same, respectively, to make, construct, or manufacture or use (subject to certain qualifications and restrictions then agreed on by and between plaintiff and defendants) the said pair of steam-engines, about to be made, on board, &c., upon the principle of the inventions secured by the said letters patent, respectively, or any of them,

\*235] with all or any of the improvements \*specified in the said letters patent or any of them, and all apparatus necessary for the purposes; and also thenceforth, during the terms for which the said letters patent were respectively granted, or any of them, and during the term of any renewal, &c., respectively, to make, construct, or manufacture and use (subject to the said qualifications, &c.,) on board of any other vessel or vessels thereafter to be purchased or built by, for or on account of the company, any steam-engine or steam-engines upon the principles of the inventions aforesaid or any of them, with all or any of the improvements aforesaid, and all apparatus necessary for those purposes; and, in consideration of the premises, defendants did then agree with plaintiff in manner following: that defendants should and would pay to plaintiff 2000*l.* by the instalments and in the manner following; that is to say, 1000*l.* on 1st August, 1837, and the remaining 1000*l.* on 1st July, 1838; and also that defendants would pay to plaintiff at and after the rate of 5*l.* per horse power of each and every engine which should, at any time or times thereafter, be made, constructed, or manufactured and used on board any other ship or vessel, ships or vessels, thereafter to be purchased or built for or on account of the company during the continuance of the said several letters patent or any of them, or during the continuance or renewal, &c., in which the principles of the inventions secured by the said letters patent respectively, or any of them, or all or any of the improvements specified in the said letters patent, or any of them, should be used or adopted by the company; *the same to be paid for on the signing of or entering into the contract or contracts for the manufacturing or purchasing of such engine or engines,*

\*236] *respectively*, either in cash or in bills at the option of the \*defendants; but, in case the same should be made in bills, then the same

should bear interest at the rate of 5 per cent. to commence and be calculated from the expiration of nine months from the date of such contract or contracts; provided that, in case any vessel belonging to the company, on board of which any engine or engines should be used in which all or any of the principles of the inventions and improvements as aforesaid should have been adopted or used, should be lost at sea or destroyed, or the engines or vessels should be worn out, or in which (a) the use of such inventions and improvements should be abandoned from any cause whatsoever, the company should be at liberty to substitute any other vessel or vessels, or engine or engines, of any equal or greater or less power, in lieu thereof respectively, without paying any consideration for the same, unless the same should exceed in power the engine or engines which should be so lost, destroyed or abandoned; and, in case the same should so exceed, then on payment only for such excess, at the rate and after the manner aforesaid; provided, and it was further agreed, that the arrangements of the needful apparatus, and the manner in which it should be constructed and applied on board the said vessel, should be subject to the approbation of plaintiff or other the owner for the time being of the said letters patent, who should be at liberty to employ a servant or agent to superintend such arrangement and application at the expense of the plaintiff, and that no application of the said patent apparatus, or any part thereof, or any alterations therein, should be made but what should be first approved of by plaintiff, or the owner for the time being of the said patent rights or any renewal or renewals of the same respectively, or \*his or their servants or agents; but it was declared and agreed by and between plaintiff and defendants, and plaintiff did then undertake and agree, that, on receiving notice from or on behalf of the company of their intention to adopt the said patent apparatus, or any part thereof, or to make any alteration therein, or in the application thereof in any engine or engines of or for the company, plaintiff or other the owner for the time being should forthwith, either by himself or his servants or agents, superintend such arrangements, applications or alterations, and approve of the same, and, in default of his or their so doing, it should be lawful for the company, without such approbation as therein aforesaid, to make such arrangements, applications or alterations as therein aforesaid; and plaintiff then further agreed with defendants to furnish, at his own expense, to the company all necessary drawings, and also to make and furnish any part of the said apparatus as might be required by their engineers, Messrs. Claud, Girdwood and Company, but to be paid for by Messrs. C., G. and Company; and plaintiff did then further agree that he would, at his own expense, within thirty days after being required, &c., (by the company's secretary,) use his utmost endeavours, by suit or otherwise, to protect, and prosecute any person or persons using or infringing upon, the said patent

(a) Sic.

rights, or any of them, unless such person or persons should have previously agreed with plaintiff for the use of the same.

And thereupon then, to wit on, &c., in consideration of the premises, and that plaintiff at defendant's request had then promised, &c. (mutual promises were then alleged;) and plaintiff avers that the terms, for which

\*238] the said several letters patent were made and granted as \*aforesaid, existed, and the said letters patent were and remained and continued in full force and effect, for and during all the time hereafter mentioned, and until and at and after defendant's breach of the said agreement and promise as hereafter mentioned; and plaintiff hath performed all things in the said agreement contained on his part to be performed; and the company, and the defendants, who, at the time of the making of the said agreement, were members, have, at all times after the making of the said agreement, and during the terms for which the said letters patent were granted, had the plaintiff's license and authority to make, construct, or manufacture or use (subject to the qualifications, &c.,) on board of any other vessel or vessels to be purchased or built, or purchased or built, after the making of the said agreement for or on account of the company, any steam-engine or steam-engines upon the principles of the inventions secured to the plaintiff by the said letters patent respectively, or any of them, according to the said agreement specified, and all apparatus necessary for those purposes: Yet that, after the making of the said agreement, and during the terms for which the said letters patent were respectively granted, and before the commencement of this suit, to wit 29th May, 1838, a certain contract in writing was made and entered into by and between the company and certain persons, to wit William Fawcett, &c., using the name, style and firm of Messrs. Fawcett, Preston and Company, for the manufacturing by the said W. F., &c., two engines of 550 horse power, for the purpose of propelling and being used on board of a certain vessel, to wit a vessel called The President, before then, and after the making the said agreement, built by and for and on the account of the

\*239] company, and during the continuance of the said letters patent, and in which engines the principles of the inventions secured by the said several letters patent were to be used and adopted by the company; and thereupon, that is to say *on the entering into the said contract*, defendants became and were liable to pay to plaintiff, either in cash or in bills as aforesaid agreed on, a large sum of money, to wit 2750*l.*, being a sum at and after the rate of 5*l.* for each horse power of the said two engines of 550 horse power; and although a reasonable time for defendant to pay the said sum of 2750*l.* in cash or bills had elapsed after the making of the said contract and before the commencement of this suit, and although plaintiff hath always been ready and willing to accept that payment of defendants, either in cash or bills as aforesaid, according to the agreement and promise, and afterwards, to wit on, &c., requested defendants that

they would so pay him, &c., according to the said agreement; yet defendants have disregarded their said agreement and promise, and did not nor would, on the said entering into the said contract so made as aforesaid on the said 29th May, 1838, or at any other time, pay to plaintiff in cash or in bills or otherwise the said 2750*l.*, or any part, &c., but have hitherto wholly neglected, &c.

Third plea: that, after the making of the said contract for the manufacturing the said engines in the declaration mentioned, and within nine months from the date thereof, and long before the commencement of this suit, and before any one of the principles of the invention secured by the said letters patent or any part thereof, and before any one of the improvements specified in the said letters patent or any part thereof, had been used or adopted by the company or by the said William Fawcett, &c., in the \*manufacturing by them of the said two engines in the said declaration mentioned, or either of them, it was, to wit on 30th May, 1838, mutually agreed, by and between the company and the said W. F., &c., that so much of the said contract for manufacturing the said engines as related to the using and adopting therein the said principles of the said inventions secured by the said letters patent should be, and the same then was, wholly rescinded and abandoned, and that the persons aforesaid should manufacture the said engines for the company without using or adopting therein the said principles of the said inventions secured by the said letters patent, or any part thereof, or the said improvements specified in the said letters patent, or any part thereof: that the said W. F. &c., afterwards, to wit on the same day and year aforesaid, manufactured the said engines for the company, and that there never was at any time used or adopted in the said engines, or in the manufacturing thereof, any whatsoever of the said principles of the said inventions secured by the said letters patent, or any part whatsoever thereof, nor any of the said improvements specified in the said letters patent, or any part whatsoever thereof; but that, on the contrary, the said engines were made and manufactured upon a principle, and in a manner, different and distinct from the said principles of the said invention and improvements secured by and specified in the said letters patent, or any of them: that defendants, to wit on 1st January, 1837, paid to plaintiff the said sum of 2000*l.* in the said agreement mentioned; and that neither plaintiff, nor any other owner for the time being of the said letters patent, or any of them, ever employed any servant or agent whatsoever to superintend the manufacturing of the said \*engines or any part thereof, or the application therein or thereto of the said patent apparatus, or any part thereof, or otherwise howsoever; nor did plaintiff, or any such owner as aforesaid, make or furnish, nor was he or they ever required to make or furnish, to the company, or to any other person or persons whatsoever, any drawing or drawings whatsoever, or any apparatus whatsoever, for or in respect of the said engines or the manufacture thereof; nor did plaintiff, or any other

person or persons whatever, ever incur any labour or trouble or expense whatsoever in respect of the said engines, or in respect of using or adopting, or the proposal to use and adopt, the said principles or improvements in the said engines or either of them, or in the manufacture thereof; nor was plaintiff ever required by the secretary of the company, or the said company, or any member thereof, to use any endeavours to protect the said patent, or to prosecute any person using or infringing the same.

Verification.

General demurrer. Joinder.

*Cowling* for the plaintiff. The plea is bad in substance. It assumes that the agreement, as to the 5*l.* for each horse power, contains something in the nature of a condition precedent, and that the company may elect to abandon the agreement by their own act. The assumed condition precedent, is the user by the company. But the agreement is for the license to use; and that the company have, whether they choose to avail themselves of it or not. The granting of the license is a valuable consideration. The defendants have paid in respect of the vessel first mentioned in the declaration, though they do not own that they have used the principle \*in the engines of that vessel. How long may the grantees  
 \*242] of the license wait? Can they deprive the plaintiff of his right to recover in respect of having granted the license? That the actual user is not the condition precedent is clear from the specification that the payment shall be made when the company contract for the engines. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance of that, which is the consideration of the money or other act." Note (4) to *Pordage v. Cole*, 1 Wms. Saund. 320 b, (6th ed.) That principle was acted on in *Wilks v. Smith*, 10 M. & W. 355. It is immaterial what was done after the contract was signed.

*Martin*, contra. The money is to be paid for the user: the 5*l.* is for each horse power in every engine which shall "be made, constructed, or manufactured and used." The payment is contingent on the making. It is true that the plaintiff might have demanded the payment on the making of the contract: but, had he done so and received the money, it might have been recovered back on the consideration failing. That being so, the rule against circuity of action applies; and the plaintiff cannot claim  
 \*243] the money. Thus, where \*freight is to be paid on shipment of goods, it is not earned without performance of the voyage, and, if paid, may be recovered back if the voyage be not performed; *Mashiter v. Buller*, 1 Campb. 84. That principle was acted upon by the court in

*Mansfield v. Mailland*, 4 B. & Ald. 582. The passage cited from note (4) to *Pordege v. Cole*, 1 Wms. Saund. 320 b, applies to conditions precedent: this is a question of failure of consideration: and, as on that ground the money if paid might have been recovered back, the law will not now require that it shall be paid; note (2) to *Turner v. Davies*, 2 Wms. Saund. 150; *Carr v. Stephens*, 9 B. & C. 758. [COLERIDGE, J. When would the patentee be safe?] He might require an election in a reasonable time.

*Cowling* in reply. It is true that, supposing the money, if paid on the signing of the contract, to be recoverable back again in the event of non-user, the plaintiff cannot now succeed. But it would not be so recoverable. The consideration has been given. On the defendants' construction, the plaintiff would have made over his right without being secure of obtaining any compensation. (He was then stopped by the court.)

LORD DENMAN, C. J. This is an agreement by which the defendants purchase of the plaintiff a license for the company to use the plaintiff's principle in the steam-engines already contracted for, and in any steam-engines which the company shall "make, construct, or \*manufacture or use;" the price is estimated; 2000*l.* to be paid by instalments on days now past, and also 5*l.* per horse power for every engine which shall "thereafter be made, constructed, or manufactured or used," on board any vessel to be thereafter built by the company in which the principle shall be adopted. The agreement, therefore, is defined by the quantity of power in the engines to be contracted for. It cannot, I think, be contended that an actual user was necessary to entitle the plaintiff to recover, or that more than the contract was required to constitute the consideration of the price. There seems to me, therefore, to have been no failure of consideration; so that the point as to circuitry of action does not arise. There has been only a change of mind on the part of the defendants; but they cannot by such change of mind get rid of their liability. It struck me, at first, that the actual user of the principle was necessary in order to determine the amount of price; but it seems to me that the agreement determines the price by a reference, not to the user, but to the contract. [\*244]

WILLIAMS, J. I am of the same opinion. On reference to the agreement, we find that the defendants are to pay to the plaintiff, first, a gross sum of money, as to which no question arises; and, secondly, 5*l.* per horse power to be paid on the making of any contract for the manufacturing or purchasing of engines; so that, as to this, the payment of the money is to be determined by the terms of such contract. Mr. *Martin* has failed to distinguish between the sum to be paid in gross and the 5*l.* per horse power. I think both stand on the same footing. Nothing is required to be done \*under the contemplated contracts: the plaintiff cannot compel the company to use the engines: what he [\*245] sells is the privilege.

COLERIDGE, J. I am of the same opinion. The question has been put

upon its true ground. It rests entirely upon the agreement between the parties. Now, if we confine ourselves to the first part of the agreement, a strong inference would arise in favour of Mr. *Martin's* view: as far as that goes, I think he has proposed the proper construction, namely, that the plaintiff is to permit the principle to be used for all future vessels, in consideration of which the defendants are to pay down 2000*l.*, and also to make an additional payment pro rata for all that are to be actually constructed. Mr. *Martin* says, and I think truly, that this would show that the 5*l.* is to be paid on each engine that is actually made. But the agreement does not stop there: for it goes on to state a condition which furnishes an explanation of the terms; I mean the condition which shows when the payment is to be made, namely on the signing each contract for the construction of the engines. The parties therefore seem to agree, with the view of putting an end to disputes by a fixed stipulation, that they will look to the signing of the contract by the company with a third party, who is to furnish the engine. That is reasonable, because the contract would show what horse power was to be employed. By this the parties clearly mean that, when the company have gone so far as to enter into the contract, they shall be considered to have used the privilege.

\*246] \*WIGHTMAN, J. I am of the same opinion. It seems to me that the test which both counsel apply is conclusive, namely whether, if this money had been paid, it could be recovered back as money had and received on the defendants choosing to rescind the agreement. I think it could not be so recovered. It might impose great difficulty on the patentee if he were put to discover when the defendants had used the engine. The time, therefore, fixed upon is that of contracting to use it. One party says, "I will use your engine; and here is the money for permitting me to do so." After that, he cannot change his mind; or else there would be this obvious difficulty, which could not be answered: suppose the engine maker had chosen not to rescind the contract, but had completed the engine, would the defendants be entitled to refuse payment to the plaintiff on the ground that they did not mean to use the engine? Or, if they had paid, could they recover the money back? It seems to me, therefore, that this is an agreement to pay for the privilege of using, whether there be an actual user or not, upon the company entering into the contract.

Judgment for the plaintiff.

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\*HARTLEY and Another v. MANTON.

Assumpsit. 1st count on a bill of exchange for 359*l.*, drawn at Rio de Janeiro, by Steele and Manton, on defendant, Manton, payable to plaintiffs, and accepted by defendant.  
2d count, on an account stated.

Plea, as to the first count and 359*l.*, parcel of the moneys mentioned in the second count, identifying the latter sum with the sum specified in the bill, and stating: That defendant and A. Steele were partners in London under the name, &c., of Manton, Steele

and Co., and at Rio, in the Brazils, under the name, &c., of Steele and Manton, defendant residing and carrying on the business in England, and Steele at Rio. That the bill was drawn and endorsed to plaintiffs at Rio by Steele, in the name of Steele and Manton, for a joint debt of defendant and Steele, incurred at Rio; and was drawn upon, and accepted by, defendant, in the name of the London house. That, after the drawing and endorsing, and before the acceptance, defendant and Steele, at Rio, being indebted to plaintiffs in the above sum, and to other persons in divers other sums, became embarrassed, &c., and it was doubtful whether they would be able to pay in full: and thereupon, before the acceptance, &c., and while Steele was resident at Rio, the plaintiffs and the said other creditors, at Rio, of Steele and Manton agreed among themselves, in writing, that a liquidation of the debts of Steele and Manton should be forthwith commenced under the superintendence of Steele and others, and continued until the claims of plaintiffs and the said other creditors were paid in full, or liquidated to the extent of Steele and Manton's assets; that the holders of bills drawn by the Rio house upon the London house should be considered creditors for cash, but that their dividends should be retained till protest of the London bills for non-payment, and should be divided among the creditors if those bills were paid; and that, if plaintiffs and the other creditors should be paid in full, the liquidation should cease.

The plea then stated an agreement by Steele and Manton with plaintiffs and the other creditors that the liquidation, &c., should take place as above stated; and it averred that afterwards, and before the acceptance, &c., the firm of Steele and Manton, by Steele, proceeded, and were, until the commencement of this suit, proceeding, to realize the effects of Steele and Manton for the purposes of the agreement. That defendant accepted the bill after the making of the agreement, being at the time resident in England, and ignorant of the premises stated to have taken place at Rio. That all the proceedings at Rio were according to the law of the Brazils, and that, by that law, the agreement and promises aforesaid were a full and absolute discharge and release of the said debt in respect of which the bill of exchange was endorsed, and defendant is, and was, before action brought, absolutely discharged from the said cause of action in the first count mentioned, and from the cause of action mentioned in the second count as to the 359*l*.

*Replication, De injuriâ.*

*Held*, on demurrer to the replication:

1. That the plea, as to both causes of action, was in discharge, not in excuse, and therefore the replication, even if divisible, was bad.
2. As to the first count, that the plea, if it alleged a release of the drawees before acceptance, was bad for that reason.
3. As to the same count, that a release of the drawers, under the circumstances detailed in the plea, would be no defence to the drawees.
4. *Seem*, that the plea might have been an answer to the second count, if pleaded to that only. But
5. *Held* that, being pleaded to both, it was wholly bad.

**ASSUMPSIT.** The first count stated that heretofore, &c., in parts beyond the seas, to wit at Rio de Janeiro, certain persons, by and under the style, &c., of \*Steele and Manton, made their bill of exchange directed to defendant, and thereby required him to pay that their first bill of exchange, &c., to the order of plaintiffs, 359*l*. 6*s*. 9*d*. sterling at sixty days' sight; that defendant had sight of and accepted the bill; that sixty days after acceptance elapsed before action brought; and that the said Steele and Manton endorsed the bill to plaintiffs; notice to defendant, and promise by him to pay plaintiffs; breach, non-payment. [\*248]

The second count was in the common form for 500*l*. found to be due on an account stated.

Plea 1: as to the first count, and as to 359*l.* 6*s.* 9*d.*, parcel of the moneys in the second count mentioned: that the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., so found to be due to plaintiffs on an account stated as in the last count mentioned, is the sum of 359*l.* 6*s.* 9*d.* specified in the said bill of exchange, &c., and the said two sums are one and the same debt, and the said bill was accepted by defendant, as in the first count mentioned, for and in respect of the 359*l.* 6*s.* 9*d.*, parcel, &c., in the second count mentioned. That, before and at the time of the making of the promise in the last count mentioned as to the 359*l.* 6*s.* 9*d.* parcel, &c., and before and at the time of the making of the said bill, &c., and before and at the time of the making of the agreements hereinafter in this plea mentioned, defendant and one Andrew Steele were merchants and copartners in trade carrying on their business as such merchants, &c., in copartnership, to wit at London and in parts beyond the seas, to wit at Rio de Janeiro in the empire of the Brazils. That defendant and Steele carried on their said business in London under the name, style, &c., of Manton, Steele and Co., and at Rio de Janeiro under the name, &c., of Steele and Manton. That, \*before and at the time of the making of the promise, &c., as to the 359*l.* 6*s.* 9*d.*, parcel, &c., and before and at the time of the making of the bill, &c., and of the agreements next after mentioned, and before and at the time of the accepting of the said bill, &c., defendant resided and was in England, and carried on there the said business of himself and his said copartner by and under the name, style and firm aforesaid, as such merchants and traders as aforesaid; and the said Andrew Steele, before and at the time last aforesaid, and from thence hitherto, resided and was at Rio de Janeiro aforesaid, and carried on there the said business of himself and his said copartner by and under the said name, style, &c., of Steele and Manton as such merchants and traders as aforesaid. And that the said bill of exchange was made and drawn upon defendant, and afterwards endorsed to plaintiffs, as in the first count mentioned, in parts beyond the seas, to wit at Rio de Janeiro aforesaid, by the said Andrew Steele, as such copartner of the said defendant as aforesaid, by and under the said name, style, &c., of Steele and Manton as in the said first count mentioned, for and on account of a certain debt, to wit the sum of 359*l.* 6*s.* 9*d.*, at the time of the making of the said bill due and owing to plaintiffs from defendant and Andrew Steele jointly, and incurred by them at Rio de Janeiro aforesaid to plaintiffs by and under their said name, &c., of Steele and Manton; and that there was no consideration for the said endorsement of the said bill of exchange except the joint debt of defendant and Andrew Steele; and the same bill was directed to defendant by being directed to the said firm of Manton, Steele and Co. at London, and not otherwise; and the said bill of exchange was accepted by defendant under the said partnership name, \*&c., of Manton, Steele and Co. and not otherwise; and the said account stated, as to the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., was had and stated between

defendant and Andrew Steele jointly and the said plaintiffs for and in respect of the said debt of 359*l.* 6*s.* 9*d.* so due from the said firm of Steele and Manton, and not otherwise. And that, after the making of the promise, &c., as to the said 359*l.* 6*s.* 9*d.*, parcel, &c., and after the making and endorsing, &c., and before the acceptance, &c., and whilst the said debt was due and owing from defendant and Steele to the plaintiffs, to wit on, &c., the said Andrew Steele being then resident at Rio de J. aforesaid, and subject to the laws of the empire of the Brazils, defendant and Steele, by and under their said name, &c., of Steele and Manton, at Rio de J. aforesaid, were indebted to plaintiffs in the said sum of 359*l.* 6*s.* 9*d.*, for which the said firm of Steele and Manton had made and endorsed to plaintiffs the said bill of exchange, which was then held by plaintiffs; and defendant and the said A. Steele, by and under their said name, &c., of Steele and Manton, at Rio de J., were then also indebted to divers other persons respectively resident at Rio de J. aforesaid in divers large sums of money, and were in embarrassed circumstances and unable to meet their engagements; and it was then doubtful whether defendant and Andrew Steele would be able to pay or satisfy plaintiffs and the said other creditors of the said last mentioned firm at Rio de J. aforesaid respectively their debts in full, whereof plaintiffs and the said other creditors then had notice. And thereupon afterwards, to wit on, &c., in parts beyond the seas, to wit at Rio de J. aforesaid, and whilst the said Andrew Steele was so resident there as aforesaid, and before defendant accepted the said bill as in the first count mentioned, the said plaintiffs and the said creditors at Rio de J. aforesaid of the said firm and commercial house of Steele and Manton did, by a certain agreement then made and reduced into writing and signed by plaintiffs and the said other creditors, according to the laws of the said empire of the Brazils, mutually agree and accord, according to the force, form and effect of the said laws of the said empire, in manner following, that is to say: [\*251

That they the said plaintiffs, and the said other creditors at Rio de J. aforesaid, of the said firm, &c., of Steele and Manton, having been duly convened, &c., and having met, &c., and the state of the affairs of the said last mentioned firm having been then duly presented to plaintiffs and the said other creditors respectively by the said A. Steele, with a list of debtors and creditors of the same firm, the former amounting, in English money, to 22,350*l.*, and the latter, in English money, to 14,210*l.*, not including a sum of 8350*l.*, the amount of certain bills drawn by Steele and Manton on their London house, to wit, Manton, Steele and Co., of which the payment or non-payment was then unknown; and the plaintiffs and the said other creditors then considering that the failure of Steele and Manton proved not to have arisen from fault or negligence on their part, &c.; the plaintiffs and the said other creditors at Rio de J. aforesaid then and there agreed mutually with each other to the following agreement and deliberation.

1. That the liquidation of the debts of the said firm of Steele and Manton should be forthwith commenced, and continued until the claims of the plaintiffs and the said creditors were either paid in full or liquidated to the extent of the assets of the same firm. 2. That \*the liquidation should be conducted by the said A. Steele, who should proceed therewith under the inspection of persons whom the plaintiffs and the said other creditors then nominated and authorized as a permanent commission for that purpose. 3. That the liquidation should be made with the least possible delay, never exceeding the time allowed by the law of the empire of the Brazils; and a dividend should be made to the creditors immediately there was a sum in hand sufficient to pay them ten per cent. on their claims. 4. That the holders of bills drawn by the said firm of Steele and Manton upon the London house should be considered as creditors for cash paid, but the respective dividends should be deposited in the Commercial Bank until presentation of protests of their bills not having been paid; but, the payment in London being verified, those respective sums so deposited should be divided amongst the creditors. 5. Not material. 6. That, in case of the plaintiffs and the said other creditors being paid in full, the said liquidation should immediately cease, and, independent of any further authority, the parties of the said firm of Steele and Manton should be at liberty to resume trade under that or any other firm. 7. That, should the liquidation not yield sufficient to pay the plaintiffs and the said other creditors in full, they in every case insured to A. Steele a commission, &c., of five per cent. on all that was liquidated, in recompense of his trouble, and as a proof of their good opinion, &c. And the plaintiffs and the said other creditors granted and desired that every part of that agreement should be observed and executed entirely as was declared, in order that it might have the full effect of a judicial sentence, the same as if the plaintiffs and the said other creditors had then \*252] already been cited for that purpose; and they gave \*and granted \*253] their powers to A. Steele and the parties nominated in article 2, to represent them in and out of court in all and for all touching or that might possibly belong to that liquidation and the form of payment by them deliberated and agreed, without any reserve. As by the said agreement, &c.

The plea then averred that afterwards, to wit on, &c., at Rio de J. aforesaid, and while A. Steele was resident, &c., and subject to the laws of the said empire, and before the acceptance, &c., the said A. Steele, for and on behalf of defendant and himself by and under the name, &c., of Steele and Manton, did then agree to and with plaintiffs and the said other creditors of Steele and Manton at Rio de J. aforesaid, according to the force, form and effect of the said laws of the said empire of the Brazils, and the said plaintiffs and the said other creditors did then and there mutually agree with each other and with the said defendant and the said A. Steele, according to the force, form and effect of the said last men-

tioned laws, that the liquidation and payment of the said debts, so due to plaintiffs and the said other creditors by defendant and A. Steele by and under the name, &c., of Steele and Manton at Rio de J. aforesaid, should thenceforth commence and be continued and conducted, and the said agreement and deliberation of plaintiffs, and the said other creditors at Rio de J. aforesaid, should in all things be observed, performed and executed, according to the terms and provisions of the said agreement and deliberation, and in manner thereby provided. That afterwards, to wit on, &c., and before the acceptance by the defendant of the said bill of exchange, and forthwith and immediately after the making of the said agreement, the said firm of \*Steele and Manton, by the said A. Steele, did then proceed to realize and convert into money the whole of the said property, rights, estate and effects of the said firm of Steele and Manton, and from thence until the commencement of this suit were, and still are, proceeding with the realization and conversion into money thereof for the purpose in the said agreement mentioned, and the same hath always been and is conducted by the said A. Steele under the inspection of the said inspectors, according to the true intent and meaning of the said agreement. And defendant further says that he accepted the said bill of exchange in London aforesaid, and after the making of the said deliberation and agreement hereinbefore mentioned, and that, at the time when he accepted the said bill of exchange, he was resident in England, and was wholly unaware and in ignorance of the fact of the several premises hereinbefore mentioned to have taken place and been performed at Rio de J. aforesaid. And "that all and singular the proceedings aforesaid at Rio de J. aforesaid were made and done pursuant to and according to the laws of the empire of the Brazils aforesaid, and that, by and according to the force, form and effect of the said laws, the said deliberation and agreement and premises aforesaid were and are a full and absolute discharge and release of the said debt in respect of which the said bill of exchange was so endorsed as aforesaid, and the said defendant hath become, and was before the commencement of this suit, absolutely discharged from the said cause of action in the said first count mentioned, and from the cause of action in the said last count mentioned as to the said sum of 359*l.* 6*s.* 9*d.* parcel," &c. Verification.

Replication, de injuriâ.

Demurrer, assigning for causes : That the replication \*is bad for duplicity, because it is too large, and puts in issue all the several matters of defence alleged by the first plea, instead of putting in issue some one material allegation contained therein : and because the replication purports to deny the excuse set up by the plea for the breach of the promises in the first count, and also in the second count as to the said sum of 359*l.* 6*s.* 9*d.*, mentioned, whereas no excuse for the breach of those promises is alleged or contained in the said plea, but the same shows matter in discharge, which the said replication improperly puts in

issue as matter of excuse. And also because the said replication to the said plea assumes that all the material matters of that plea are merely in excuse, although those matters do not, as pleaded, appear, nor are, by any matter alleged in the replication, shown to be, merely matters in excuse. And also for that the defendant in and by his said plea has shown and stated an authority from the plaintiffs to break his said promises in the introductory part thereof mentioned. And also for that the said replication is informal and inapplicable, according to the established rules of pleading, to the matter of defence contained in the said plea, so far as the same contains matter in discharge.

Joinder in demurrer.

The plaintiffs stated, as their points for argument, that the replication to the first plea was sufficient, and that the first plea was bad.

The defendant's points were as follows. "That the replication of de injuriâ is inapplicable to the first plea. That plea clearly confesses a cause of action, and discharges it by matter subsequent; and numerous cases  
 \*256] have decided that when that is the case de injuriâ is \*a bad replication. Whether the discharge set up be by the operation of foreign law, or by any other means, it is still pleaded as a discharge by the law of England. In the present case it throws a great burden of proof on the defendant. The defendant will also contend, if necessary, that the first plea is a good answer to the action. The effect of the agreement or contract made at the Brazils must be determined by the 'lex loci contractûs;' and whatever right it gives there it gives every where. The matter pleaded has no reference to the form or mode of remedy, the consideration of which alone in such cases belongs to the lex fori."

The demurrer was argued in last Trinity vacation.(a)

*Cleasby* for the defendant. De injuriâ is an improper replication. The matter pleaded does not exempt the defendant from liability for not performing a promise admitted to be in force if it were not for such exemption, but shows that his obligation to perform is discharged by matter subsequent to the promise. The distinction between these two kinds of plea is pointed out by PARKE, B., in *Crisp v. Griffiths*, 2 Cro., M. & R. 159, 164; S. C., 5 Tyr. 619. The words of the plea, particularly as to the 359*l.* 6*s.* 9*d.*, clearly import a discharge, and, if so, the replication is inadmissible; *Crisp v. Griffiths*, 2 Cro., M. & R. 159, 164; S. C., Tyr. 619; *Jones v. Senior*, 4 M. & W. 123. In *Purchell v. Salter*, 1 Q. B. 197, and *Salter v. Purchell*, 1 Q. B. 209, the Courts of Queen Bench and Exchequer Chamber agreed as to the general doctrine respecting pleas in excuse and in discharge, and the replication de injuriâ, though they differed on the  
 \*257] application. It \*may be further contended, here, that the plea shows an authority from the plaintiffs, and that the replication is improper on that account. [PATTERSON, J. The plea seems to show a release at any rate as to the debt of 359*l.* 6*s.* 9*d.* included under the ac-

(a) June 17th. Before Lord Denman, C. J., Patterson, and Coleridge, Js.

count stated.] That is its effect: and the replication is inapplicable to such a defence, and, if bad in part, is bad altogether. The plea is good. It states, circumstantially, matters which amount to a release of the whole claim; and it avers that the transaction had that effect by the law of Brazil. Had it been pleaded, according to its legal effect, simply as a release, no objection could have been made to it.

*W. J. Alexander, contra.* No precedent has been found for the plea here pleaded; and, if it be not bad, *de injuriâ* is a proper answer to it. Such a plea would introduce the very mischief which the replication *de injuriâ* was intended to meet, and which is thus stated in 1 Smith's Leading Cases, 57, (note on *Crogate's Case*, 8 Rep. 66 b;) "As soon, however, as the extent of general issues was confined, and special pleas began to be of every-day occurrence in assumpsit, it became desirable, that the plaintiff, who has but one replication, should be enabled to put in issue several of the numerous allegations which the special pleas were found to contain; otherwise he would have laboured under the hardship of being frequently compelled to admit the greater part of an entirely false story." This plea seems to be framed upon that in *Jones v. Senior*, 4 M. & W. 123, which the Court of Exchequer considered not to be in excuse; there, however, not only a composition but an actual payment appeared: here no satisfaction is stated. It may have been intended to do something which would have discharged the defendant; and a plea showing that any thing had been effected in fulfilment of such intention might have been good, but not a plea stopping short at the mere intention; *Hemingway v. Hamilton*, 4 M. & W. 115. This plea only states that Steele and Manton, by Andrew Steele, "did then proceed to realize and convert into money" the property of the firm; not showing that any thing was in fact realized. The concluding part of the plea states the gist of the defence, namely that, after the making of the agreement, defendant accepted the bill in ignorance of the premises before stated to have taken place at Rio: that all the proceedings there were according to the laws of Brazil; and that, by force of the said laws, the said agreement and premises were a discharge and release of the debt in respect of which the bill of exchange was endorsed, and defendant has become, and was, before the commencement of this suit, absolutely discharged from the cause of action in the said first count mentioned, and from the cause of action in the last count mentioned as to the 359*l.* 6*s.* 9*d.* This, as to the bill of exchange, is matter of excuse, because it happened before the acceptance: it is also, in reality, no more than excuse as to the 359*l.* 6*s.* 9*d.*, for the agreement nowhere stipulates for the absolute discharge of any debt; it has merely the effect of giving time. [COLERIDGE, J. The plea says that the matters stated are a discharge by the law of Brazil.] The defendant cannot drive the plaintiffs to an issue on the law of Brazil: he is indebted on a contract made in this country. [COLERIDGE, J. This arises on replication; you must take the plea as you find it. [PATTE-

[\*258]

[\*259]

son, J. The statement of account appears to have been in Brazil.] In *Mitchell v. Cragg*, 10 M. & W. 367, the defendant, being sued as acceptor by the endorsee of a bill of exchange, pleaded that, after the bill became due, defendant was applied to by F. and G., the drawers and endorsers, for payment, and paid them certain sums of money, which, together with the price of a horse sold them by defendant (and which price was to be set off against the bill,) F. and G. accepted in full satisfaction and discharge of the amount of the said bill, and of defendant's acceptance; and that the bill was not endorsed to plaintiff until after the said satisfaction and discharge. The replication was, "that the said plea, and the statements therein," &c., "are not true in substance and fact:" and PARKE, B., though he appears to have thought the replication bad, as an informal *de injuriâ*, said: "I see no reason why *de injuriâ* should not be replied in this case. The plea sets up matter of excuse for the non-payment of the bill; the defendant admits he has not paid the bill, which, as acceptor, he was bound to pay; and his defence is that the plaintiff was an endorsee under such circumstances as disentitle him to recover. The case resembles that of *Isaac v. Farrar*, 1 M. & W. 65; S. C., Tyr. & G. 281." In *Scott v. Chappelow*, 4 Man. & G. 336, *de injuriâ* was held a good replication to a plea stating that the bills were given in pursuance of an illegal contract which was known to the plaintiffs before they gave value for or became holders of the bills. In *Crisp v. Griffiths*, 2 Cro., M. & R. 159; S. C., 5 Tyr. 619, where the propriety of \*the replication  
 \*260] *de injuriâ* was questioned, it appeared (as PARKE, B., observed there, and Lord ABINGER in *Isaac v. Farrar*, 1 M. & W. 65; S. C., Tyr. & G. 281,) that the plea did not set up matter of excuse but rather of accord and satisfaction, the transaction pleaded having taken place after breach. The law on this subject is also explained by the dicta in *Noel v. Rich*, 2 C., M. & R. 360; S. C., 5 Tyr. 632; *Watson v. Wilks*, 5 A. & E. 237, and *Reynolds v. Blackburn*, 7 A & E. 161. The third resolution in *Crogate's Case*, 8 Rep. 66 b, "that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff," *de injuriâ* shall not be replied, and "the same law of an authority given by the law," does not apply here. The law referred to must be that of England. The authority of law should, according to the opinion of PATERSON, J., in *Bowler v. Nicholson*, 12 A. & E. 341, 355, be "an authority derived mediately or immediately from the plaintiff himself:" but there is no warrant for saying that the authority of a foreign law can emanate from the plaintiff so as to bring a case within the third resolution. Besides, there is a distinction between an authority from and an agreement with the plaintiff. An agreement implies mutuality; an authority is unilateral; and TINDAL, C. J., in *Salter v. Purchell*, 1 Q. B. 219, when referring to this clause of the resolutions in *Crogate's Case*, 8 Rep. 66 b, speaks only of "authority or command or license from the plaintiff." Nor is the case of an agreement mentioned in the note upon this part of *Cro-*

*gate's Case*, 8 Rep. 66 b, in 1 Smith's Lead. C. 55—57. In *Crisp v. Griffiths*, 2 C., M. & R. 159; S. C., 5 Tyr. 619, the distinction between \*authority and agreement was insisted upon in the argument urged in defence of the replication. And, further, the authority, if any, in this case was prior to the acceptance; and there could not be an authority to break promises not yet made. If it were held that the transaction here pleaded could, by force of the Brazilian law, make a subsequent acceptance inoperative, the negotiability of foreign bills of exchange would be materially affected. The replication is at all events good as to the ground of action in the first count. [\*261]

*Cleasby*, in reply. *Salter v. Purchell*, 1 Q. B. 209, (see p. 219,) shows distinctly that the authority mentioned in the third resolution in *Crogate's Case*, 8 Rep. 66 b, includes matter of agreement. [Lord DENMAN, C. J. The principle relied upon, that the matter is within the plaintiff's knowledge, applies to that.] And an agreement does, virtually, communicate an authority. A right is given to the defendant by the plaintiff's act. *Scott v. Chappelow*, 4 Mann. & G. 336, is a case in favour of the present plaintiffs. TINDAL, C. J. said there: "The plea, as it appears to me, amounts to no more, in substance, than an excuse for the non-payment of the bills by the defendant, by reason of there having been no consideration for his acceptance of them." The want of consideration existed before the acceptances were given. In *Reynolds v. Blackburn*, 7 A. & E. 161, the attention of the court was turned chiefly to the plea; the point now in question was scarcely considered. It is argued that the present plea does not show a discharge, because it does not expressly state that any thing was realized under the composition. But an agreement of this kind \*between debtor and creditor of itself destroys the right of action. In *Jones v. Senior*, 4 M. & W. 123, the satisfaction pleaded was not a satisfaction in law of the debt for which the action was brought. In many cases of composition it has been held that the creditor's remedy was barred by the agreement, though no actual satisfaction had resulted; *Boothbey v. Sowden*, 3 Camp. 174; *Good v. Cheesman*, 2 B. & Ad. 328; *Tatlock v. Smith*, 6 Bing. 339, the principles of such cases is affirmed by *Garrard v. Woolner*, 8 Bing. 258. The arrangement here pleaded took place between the original debtor and creditors after the right of action for the debt had fully vested: if the agreement takes away the right of action it must operate in discharge, not excuse. And the plea expressly states that the transaction was a discharge, by the law of Brazil. [\*262]

*Cur. adv. vult.*

Lord DENMAN, C. J., in the vacation after this term, (December 9th,) delivered the judgment of the court.

This was an action by the endorsees against the acceptor of a bill of exchange, and on an account stated. The plea states that the defendant and one Andrew Steele carried on business in London and at Rio de Janeiro; at the former place under the firm of Manton, Steele and Co., at

the latter under the firm of Steele and Manton; that Steele and Manton drew the bill in question on Manton, Steele and Co., payable to their own order, and endorsed, it to the plaintiffs for a bonâ fide debt, the subject matter of the account stated: that afterwards, and before the bill was accepted, Steele and Manton stopped \*payment, and made an arrangement with their creditors, the plaintiffs being parties to it, the effect of which, according to the law at Rio de Janeiro, was that Steele and Manton were fully and absolutely discharged and released from the debt for which the bill was endorsed to the plaintiffs: and that the defendant accepted the bill after such discharge and release, and in ignorance of it. The plea also states that part of the arrangement was that the holders of bills drawn by Steele and Manton upon the London house of Manton, Steele and Co., should be considered as creditors for cash paid, but the respective dividends should be deposited in the Commercial Bank until presentation of the protests of their bills not having been paid; but, the payment in London being verified, those respective sums so deposited should be divided amongst the creditors. The plaintiffs replied de injuriâ; to which the defendant demurred specially.

This plea, so far as regards the account stated, is plainly in discharge, not in excuse, and therefore the replication is, to that extent bad. We think also that, as regards the count on the bill, the plea shows matter of discharge and release; either that the acceptance was never binding, or, if binding, that it was released by the plaintiffs themselves; and we therefore hold that the replication, even if divisible, is bad, according to the recent cases, which it is not necessary here to enumerate.

But the plaintiffs contend that the plea itself is bad. If it be treated as setting up a release of the drawees before the bill was accepted, then the case of *Drage v. Netter*, 1 Lord Raymond, 65, is an authority to show that it is bad, because \*it was made before the defendant was chargeable, viz., before acceptance. Again, if the plea be treated as setting up a release of the drawers, it is difficult to see how it can operate to discharge the drawees. It is true that the houses at Rio and in London consisted of the same persons; still it is very possible that they may have had different sets of creditors, and that, though the house at Rio had stopped payment, the house in London may have been perfectly solvent. The bill may have been drawn for a good and valuable consideration, and it may have been very proper that it should be accepted, although the plaintiffs had agreed that in the event of their not being paid by the drawees they would accept a composition from the drawers, and had executed an instrument by which they discharged them. Indeed, from the clause in the agreement which is above set out, it is plain that the parties to that agreement contemplated that some bills which had been drawn by the one house on the other might be accepted and paid, and in that event the holders were to have the full benefit of such payment, and not to bring the amount into hotch-pot. In other words, it is plain that

the creditors at Rio did not intend to discharge the London house if it should so happen that any of them had the security of that house for their debts. The plea, therefore, does not show that the defendant, as acceptor, if the acceptance had been already made before the agreement was entered into at Rio, would have been discharged either by the law at Rio or by the terms of the agreement: much less does it show any thing which discharged the drawees from accepting the bill, or released them from paying it if they did accept it.

For these reasons we are of opinion that the plea is \*bad as an answer to the first count, and that the defendant, having accepted the bill, is bound by that acceptance notwithstanding what is stated to have taken place at Rio. As regards the account stated, the plea would probably be good, if it had been pleaded to that count only; but, as it is pleaded to both counts and is bad as to one, it is, according to the universal rule, bad as to both; and our judgment must be for the plaintiffs. [\*265]

Judgment for plaintiffs.

### GEORGE CLIPSHAM v. STEPHEN VERTUE and HORATIO VERTUE.

By charter-party between plaintiff, owner of a ship, and defendants, it was agreed that the ship should load from defendants' agent at Nantes a full cargo, and, being loaded, forthwith proceed to London, and deliver the cargo on being paid freight upon unloading and delivery, twenty-five running days being allowed for loading and discharging at Nantes and London, with penalty for demurrage beyond.

A declaration in assumpsit set out the charter-party, and averred that the vessel arrived at Nantes, whereof defendants' agent there had notice; that the ship was ready to load the cargo, and defendants' agent was requested, during the running days, to load it, and plaintiff was ready to detain the ship on demurrage over those days: but defendants refused to load.

Plea that, after the making the charter-party and before proceeding to Nantes, the vessel proceeded to Newcastle, contrary to the intent of the charter-party, and, by reason thereof, arrived at Nantes a long and unreasonable time after the time at which she would have arrived at Nantes had she sailed direct according to the intent of the charter-party.

*Held* bad, on demurrer, for not showing that the delay frustrated the object of the voyage.

ASSUMPSIT. The declaration alleged that heretofore, to wit on May 28th, 1842, by a charter-party then made and entered into by and between plaintiff (therein described as master of the ship called the Emblem, of &c., then bound to Nantes) and defendants, bearing date, to wit, &c., it was agreed between plaintiff and defendants that the said ship, being tight, staunch, &c., should load from the agents of the defendants at Nantes a full cargo of wheat and flour, &c., not exceeding what she could reasonably stow, &c., and, being so loaded, should forthwith proceed to \*London, or so near thereunto as she might safely get, and deliver the same on being paid freight 3s. per quarter for wheat, &c.; the act of God, the queen's enemies, fire and all and every other [\*266]

dangers and accidents of the seas, rivers and navigation, of whatever nature or kind soever, during the said voyage, always excepted; the freight to be paid on unloading and right delivery of the cargo, one half in cash, &c.; twenty-five running days to be allowed the defendants (if the ship was not sooner despatched) for loading the said ship at Nantes and discharging at London, and the days on demurrage, over and above the said laying days, at 2*l.* per day penalty for non-performance of that agreement: 100*l.* cash for ship's use to be advanced at Nantes by defendants' agents, if required; and free of lighterage, if any. And the said charter-party being so made as aforesaid, afterwards, to wit on, &c., in consideration thereof, and that plaintiffs, &c., (mutual promises to perform the charter-party:) That defendants, to wit by their memorandum by them endorsed on the charter-party, ordered and directed plaintiff to apply at Nantes aforesaid to certain persons therein described as Messrs. Thibeu, frères, to wit as the agents of defendants in that behalf: That the said ship before and at the time of the making of the charter-party was, and thence continually hitherto hath been, tight, staunch, &c., and fitted for the voyage in the charter-party mentioned; and, being in such condition, &c., the said ship did afterwards, and after the making of the charter-party, and in performance thereof, to wit 16th June, 1842, proceed to Nantes aforesaid; and the said ship afterwards, to wit 26th July, 1842, arrived at

\*267] Nantes aforesaid; whereof the \*said persons so described in the said memorandum of the defendants as Messrs. Thibeu, frères, the said last mentioned persons then being the agents of the defendants at Nantes aforesaid, within the true intent, &c., of the charter-party, then had notice. And, being so arrived, &c., the said ship afterwards, to wit 6th August, 1842, was ready to load her cargo in the charter-party mentioned within the true intent, &c., and meaning of the charter-party; and the said running days in the charter-party mentioned then commenced: of all which last mentioned premises, &c., (notice to Thibeu, frères, &c., then being agents of defendants.) And although plaintiff hath always performed and fulfilled all things in the charter-party contained on his part, &c., and, at the time of the commencement of the said running days, and continually thenceforth, to wit for the full period of the said running days, was ready and willing to receive and take on board the said ship or vessel, at Nantes aforesaid, from the agents of defendants, upon the terms and conditions in the charter-party in that behalf mentioned, a full and complete cargo of wheat, &c., pursuant to the charter-party in that behalf, and proceed therewith to London, and deliver the same as in the charter-party mentioned, on being paid freight at the rate and in the proportion in the charter-party in that behalf mentioned, whereof, &c., (avertment, as before, that the agents had notice,) and Messrs. Thibeu, frères, were then and oftentimes within the said running days requested by plaintiff to load such cargo on board of the said ship at Nantes aforesaid, pursuant to the charter-party; and although plaintiff was ready and willing to permit do,

defendants to detain the said ship or vessel on demurrage over and above the said laying days upon the \*terms and conditions in the charter-party, &c., whereof the said agents of defendants then had due notice, and of all which premises the defendants then had notice: yet defendants, not regarding, &c., but contriving, &c., did not nor would, within the said running days in the charter-party mentioned, or at any other time, load on board the said ship at Nantes aforesaid a full cargo of wheat, &c., pursuant to the charter-party in that behalf, or any wheat, &c., but wholly neglected and refused so to do, and then wholly refused to load any cargo on board the said ship pursuant to the charter-party in that behalf. By means of which said several premises, &c., (damage to plaintiff by loss of freight, and from expenses in endeavouring to procure another cargo;) and also, by reason of the premises, the said ship of plaintiff was forced and obliged to sail, and did sail, back from Nantes aforesaid, to wit to London aforesaid, without any cargo. [\*268]

Plea 3. That the charter-party was made and entered into by plaintiff and defendants at London aforesaid; and that the said vessel was, at the time of the making of the charter-party, lying in the port of London; that, after the making of the charter-party, and before the said vessel set sail or proceeded upon the said voyage to Nantes aforesaid in pursuance of the charter-party, to wit on 29th May, 1842, plaintiff wrongfully, and without the knowledge or consent of defendants, set sail with the said vessel upon another and a different voyage from the said voyage to Nantes aforesaid, to wit upon a voyage from the port of London aforesaid to the port of Newcastle in England, and proceeded with the said vessel upon the said last mentioned voyage; and afterwards, to wit 3d June, 1842, arrived at Newcastle \*aforesaid, and remained with the said vessel at Newcastle aforesaid for a long space of time, to wit twenty-three days, for other and different purposes than the said voyage in the charter-party mentioned, to wit for the purpose of chartering and engaging the said vessel to other persons than the defendants upon a voyage from Newcastle aforesaid to other places than Nantes, in parts beyond seas, and back to Newcastle aforesaid; which said sailing and proceeding to, and remaining at, Newcastle aforesaid were contrary to the form and effect and true intent and meaning of the charter-party, and a breach thereof on the part of the plaintiff: by reason of which said sailing and proceeding to, and remaining at, Newcastle aforesaid, the said vessel was prevented from arriving, and did not arrive, at Nantes aforesaid as in the declaration mentioned within a reasonable and proper time in that behalf after the making of the said charter-party; but, on the contrary thereof, the said vessel arrived at Nantes aforesaid a long and unreasonable time, to wit thirty-eight days, after the said vessel would have arrived at Nantes according to the usual length of the voyage from London aforesaid to Nantes aforesaid if the said vessel had sailed direct from London aforesaid to Nantes [\*269]

aforesaid according to the true intent and meaning of the charter-party. Verification.

Demurrer, assigning for cause that the plea neither denies nor confesses and avoids the promise in the declaration mentioned; that the plea amounts to the general issue, or to a traverse of the averments in the declaration; and that, although the plea is pleaded in confession and avoidance of the promise, &c., yet the plea does not set forth matters sufficient  
 \*270] to discharge \*defendants from the performance of their promise in the declaration mentioned, as it does not show that defendants were by the delay rendered unable to ship a cargo according to the charter-party or that by the supposed deviation or delay the object of the voyage was lost.

Joinder in demurrer.

*W. H. Watson* for the plaintiff. The plea offers no answer to the declaration. The charter-party contains no stipulation that the vessel shall sail at any particular time, or without delay, or in a reasonable time. If loss has been caused by her reaching Nantes at an unreasonable time, that can be only matter for a cross action. Mere delay does not avoid the contract; if it did, the smallest delay would put an end to the liability of the defendants. In *Freeman v. Taylor*, 8 Bingh. 124,(a) the charter-party contained a stipulation that the ship should proceed "with all convenient speed;" and, delay having been caused by a deviation, it was held that the proper question for the jury was, "whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract." It appears also from *Fillieul v. Armstrong*, 7 A. & E. 557, that a partial failure by one party to perform the contract on his side does not exonerate the other party, unless the failure absolutely destroys the object of the contract. *Bornmann v. Tooke*, 1 Campb. 377, shows that the plea here discloses no more than a ground of cross action: *McAndrew v. Adams*, 1 New Ca. 23, is an instance of such an action.

\*271] \**Cleashy* contra. The principle is as contended for on the other side: but the failure shown in the plea does go to the root of the contract, because it appears that the defendants were prevented from loading in a reasonable time, so that no benefit has been received. If any cargo had been actually carried, and this action had been brought for the freight, the plea would afford no answer, because then some benefit would have been received by the defendants. But here the contract has not been acted upon at all. Therefore, the principle of *Freeman v. Taylor*, 8 Bing. 124, applies, where the defendant was held to be exonerated because the object of the voyage was substantially defeated, though the defendant had received some benefit from the outward voyage; a point which does not clearly appear in the marginal note to the report. In

(a) See *Benson v. Blunt*, 1 Q. B. 870.

*Mount v. Larkins*, 8 Bing. 108, it was held that an unreasonable delay amounted to a deviation, and discharged the underwriter by varying the risk. If the contract here had been to arrive at Nantes on a given day, a failure so to arrive would have discharged the freighter; *Shadforth v. Higgin*, 3 Campb. 385: but it is implied in every charter-party that the ship shall sail in a reasonable time. *Touteng v. Hubbard*, 3 B. & P. 291, and *Soames v. Lonergan*, 2 B. & C. 564, are instances of the freighter being discharged by a delay substantially defeating the object of the voyage: and the principle was distinctly recognised in *Havelock v. Geddes*, 10 East, 555, 564. In *Ritchie v. Atkinson*, 10 East, 295, the owner of the vessel was held entitled to recover, *pro rata*, though he had contracted to ship a complete cargo, and had, in fact, shipped only a short cargo: the principle relied upon there was, that freight in such a case is apportionable: but here, no cargo having been put on board, owing to the unreasonable delay, there can be no apportionment. [\*272]

*W. H. Watson*, in reply, was stopped by the court.

LORD DENMAN, C. J. The plea is clearly bad. If issue had been taken on the term "unreasonable," we should have been required to put a construction upon it, and that, without further explanation, we have not the means of doing. It is quite possible that a vessel may arrive in a time which, in some sense of the word, is unreasonable, and yet that the freighter may derive benefit from the voyage; so that the principle laid down by Lord ELLENBOROUGH, in *Havelock v. Geddes*, 10 East, 555, may apply, namely, that the plaintiff's neglect shall not exonerate the defendant, unless it precludes him from making any use of the vessel; otherwise, as he says, the neglect, in that case, to put in a single nail might have been a breach of the condition forthwith to make the ship tight and strong. So this plea might, in one sense of the words, have been supported in evidence, if the slightest want of due expedition had been shown.

WILLIAMS, J. The real question is, whether a plea, using only such expressions as this plea contains, can be supported. I find no authority in its favour; what is an "unreasonable" time is left matter of speculation. To what extent the unreasonableness went, whether so far as that the voyage was lost, or the cargo could not be put on board, we are not told.

COLERIDGE, J., concurred.

WIGHTMAN, J. The meaning of the allegation is simply that the vessel did not arrive so soon as she might have done; but not that she did not arrive in time to enable the defendants to perform the stipulations in the charter-party. Judgment for the plaintiff. [\*273]

## The QUEEN v. The Inhabitants of HUNNINGTON.

That part of the parish of Halesowen which lay in Shropshire consisted of several townships, H., O., and others, but maintained its poor out of a common fund, administered by officers for the whole of that part of the parish. Afterwards, in obedience to a mandamus, separate appointments of overseers were made for the respective townships, and each then maintained its own poor. Before the subdivision, a pauper was settled in the Shropshire district of Halesowen by a hiring and service in township H. *Held*, that he was not therefore removable to township H. as the place of his settlement, when overseers were appointed for that place.

ON appeal against an order of two justices removing Elizabeth Parker (the wife of John Parker, who had deserted her) and her children from the parish of Rowley Regis in Staffordshire to the township of Hunnington in Shropshire, the sessions confirmed the order, subject to the opinion of this court upon the following case.

John Parker, the pauper's husband, is the son of William Parker, and has done no act to gain a settlement in his own right; but his father, William Parker, about the year 1790, hired and served for a year with one Daniel Hawkeswood in the township of Hunnington, which at that time formed a part of the parish of Halesowen in the county of Salop. At the time of such service, and up to the year 1832, the parish of Halesowen consisted of the said township of Hunnington, the township of Oldbury, and ten other townships, all in the county of Salop, and three  
 \*274] other townships in the county of Worcester. The three Worcestershire townships had always had separate overseers and supported their poor and managed their parochial affairs apart from each other and the rest of the parish; but that part of the parish of Halesowen which is in the county of Salop, and which consists of the township of Hunnington, the township of Oldbury and the ten other townships, formed a distinct district for the maintenance of its poor and all parochial matters up to 1832, and was known as the parish of Halesowen in the county of Salop, and for which only one set of overseers of the poor were appointed, namely four, who were annually appointed for the whole of the said last mentioned parish, and who, together with the churchwardens, made a joint poor rate, extending over the whole of the said last mentioned parish, and which formed one common fund for the general maintenance and relief of the poor and for the payment of all parochial charges for the said last mentioned parish: but each of the said townships, including Hunnington, had their respective headborough, and repaired their highways separately. In the year 1832 a mandamus was obtained directing the justices of the county of Salop to appoint separate overseers for the township of Oldbury;(a) and, by the same authority, in the year 1834, separate overseers were appointed for the remaining eleven townships, including the said township of Hunnington, from which time separate overseers have con-

(a) *Rex v. The Justices of Salop*, 3 B. & Ad. 910.

tinued to be appointed for all the said twelve townships; and each of the said twelve townships, from the time of such separation, has \*continued to maintain its own poor respectively as distinct and separate parishes. [\*275]

Upon the above facts the sessions held that the paupers were settled in the appellant township, having a derivative settlement from William Parker in right of his hiring and service in that township as above stated.

The question for the opinion of the court was, whether, upon the before mentioned facts, now that the said parish of Halesowen has ceased to maintain its own poor, and separate overseers are appointed for the said twelve townships, the said paupers are settled in the said township of Hunnington.

If the court should be of opinion that the said paupers were settled in the said township of Hunnington, the order of sessions was to be confirmed: if not, the order of sessions to be quashed.

*F. V. Lee* in support of the order of sessions. The question is whether *Regina v. Tipton*, 3 Q. B. 215, decides this case. There the pauper was born a bastard, in the workhouse; and stat. 54 G. 3, c. 170, s. 3, prevented her acquiring a settlement in Halesowen township, where the workhouse was situate. Here the pauper had a clear settlement in that part of the parish of Halesowen which now forms the appellant township. In *Rex v. Oakmere*, 5 B. & Ald. 775, which is cited in *Regina v. Tipton*, 3 Q. B. 215, the facts supposed to create a settlement in Oakmere occurred when it was extraparochial, and therefore not a place in which paupers could be settled. Here the settlement was acquired in a township forming part of the parish of \*Halesowen, but entitled, as it now appears, to have overseers of its own. The importance of this distinction appears from the judgment of Lord DENMAN, C. J., in *Rex v. Oldbury*, 4 A. & E. 167, where he cites the language of ABBOTT, C. J., in *Rex v. Oakmere*, 5 B. & Ald. 775. [Lord DENMAN, C. J. The real question in *Rex v. Oldbury*, 4 A. & E. 167, turned upon an unreasonable attempt to fix the township of Oldbury with liability by way of estoppel, because an order had been acquiesced in by the parish of Halesowen before Oldbury became a separate district. WILLIAMS, J., referred to *Rex v. Saughton on the Hill*, 2 B. & Ald. 162.] That case differs from the present. There the pauper's original settlement was extinguished by his acquiring one in Gloverstone: but Gloverstone then ceased to exist as a township; no overseer could be appointed for it; and there was no person to whom an order of justices could be directed. *Rex v. Crowland*, 8 B. & C. 711, and *Rex v. Merevall*, Burr. S. C. 661, which may be referred to, turned upon points which do not properly arise in this case. In *Regina v. Tipton*, 3 Q. B. 215, the court relied upon the precise words of stat. 54 G. 3, c. 170, s. 3, enacting that, where any person shall be born in a workhouse, such person shall, for the purpose of settlement, "be deemed and taken to be born in the district, parish, township or hamlet, [\*276]

by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house."

That, in strictness, was the parish of Halesowen. Where a district consists of vills, each of which may have its own overseers, the right to a set-

\*277] tlement in each of such vills attaches \*retrospectively from the time when overseers are actually appointed. [COLERIDGE, J.

The argument for the appellants would show that there can be no right of settlement in any of these townships of an earlier date than 1832 or 1834.]

That is the consequence.

Corbet, contra. *Regina v. Tipton*, 3 Q. B. 215, was not argued merely on the construction of stat. 54 G. 3, c. 170; nor was the question put on that ground only in the judgment of the court. The principle on which that decision mainly rests, and which governs the present case, is, that a settlement can depend only upon the state of things which existed when the settlement was gained. The more recent arrangements cannot relate back in the manner contended for. (He was then stopped by the court.)

Lord DENMAN, C. J. The principle we acted upon in *Regina v. Tipton*, 3 Q. B. 215, must decide this case. In *Rex v. Saughton on the Hill*, 2 B. & Ald. 162, this court decided that, although the settlement in the last place of residence was extinct by the destruction of the township, that did not prevent the extinction of the settlement previously acquired; and so, here, though the pauper can no longer be settled in Halesowen, it is impossible to say, without overruling former cases, that she can be settled in any of the townships into which the parish has lately been divided. In *Rex v. Oldbury*, 4 A. & E. 167, I perhaps relied too much on *Rex v. Oakmere*, 5 B. & Ald. 775. The argument of ABBOTT, C. J., there may be too subtle. He says: "this is not like the case of a modern \*278] appointment of overseers \*to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." But, supposing it correct to say that the places must have been vills from time immemorial, it may be questioned whether the right to an appointment of officers is sufficient for the argument, unless officers were actually created. In the present case, whatever inconvenience may follow, I am of opinion that no settlement can be claimed in Hunnington.

WILLIAMS, J. This question was decided by a deliberate judgment of the court in *Regina v. Tipton*, 3 Q. B. 215. There we held that the settlement, whether acquired locally in the township of the borough of Halesowen or in any other of the townships, was in fact a settlement in the parish, and could not, after the subdivision, be referred to one of the townships in particular.

COLERIDGE, J. If the matter were now open, I should wish to hear

more fully argued: but we cannot support this order of sessions without overruling *Regina v. Tipton*, 3 Q. B. 215. I therefore think that it must be quashed.

WIGHTMAN, J. There is some difference in circumstances; but the principle of that case and of this is the same.

Order of sessions quashed. (a)

(a) Another case, *Regina v. The Inhabitants of Halesowen*, was decided at the same time without argument, as undistinguishable from this.

•The QUEEN v. THOMAS BAMBER, the Younger. [\*279

(In Error.)

On indictment (November, 1842) for non-repair of a highway, alleging liability *ratione tenuræ*, it appeared by special verdict: That defendant held lands adjoining the sea; that an ancient highway had passed over the said lands, and that from time immemorial, except as after mentioned, defendant and those whose estate, &c., had restored and repaired so much of the way as passed over the said lands: that the sea had from time to time encroached upon the said highway, so that a portion of the land over which it went was covered by the sea and impassable, wherefore defendant and his predecessors had from time to time gradually removed the said highway, and appropriated other parts of the lands for the site thereof, so that the public had the uninterrupted use of it; and that the said road had always been repaired by defendant and his predecessors as or in lieu of so much of the said ancient highway: that the portion of way now alleged to be out of repair was part of the said ancient highway so passing over the said lands and used by the public as aforesaid, though passing over a different part of such lands from that formerly occupied by the road and since by the sea: that in March 1842 (before the preferring of the indictment) the sea encroached upon the part of said road now complained of as out of repair, and rendered it ruinous, &c., as in the indictment stated, and that defendant has not restored the same, but a portion thereof has, ever since the said month of March, had the earth and soil washed away, and is thereby made impassable: that the residue thereby became, and is, too narrow for passage, and now stands at the edge of a precipitous bank seventy feet deep, and forming an angle of forty-five degrees to the horizon: and that it would cost a very great sum of money to make a road over the space last occupied by the said highway.

*Held*, that defendant's liability had ceased: and, the quarter sessions having given judgment for the crown upon the special verdict, this court reversed the judgment.

ERROR from the Lancashire quarter sessions.

The record set forth an indictment (November, 1842) charging that, from time whereof, &c., there was and yet is a common and public highway leading from the hamlet and village of Blackpool in, &c., towards and unto the hamlet and village of Bispham with Norbreck in, &c., used for and by all the liege subjects, &c., with their horses, carts and carriages, &c.; and that a certain part of the said highway, situate in the township of Layton with Warbreck in the county of Lancaster, commencing at a certain gate in the said road there abutting, &c., and extending from thence in a southerly direction within the said township of Layton, &c., for the space of 131 yards and being of the length, &c., and of the

breadth, &c., on the 1st day of June, 1842, &c., was and yet is very  
 \*280] ruinous, broken and in great decay \*for want of due restoration,  
 reparation and amendment of the same, so that the liege subjects,  
 &c. ; to the great damage and common nuisance, &c. : and that defend-  
 ant, by reason of his tenure of certain lands and tenements situate in the  
 said township, called the Gyn, ought to restore, repair and amend that  
 part of the highway aforesaid, so as aforesaid being ruinous, &c., when  
 and so often as there should and might be occasion ; and that he had not  
 repaired. Plea, not guilty. The record then stated that the indictment  
 was tried at the Preston sessions, and the following special verdict found.

“ That, from time whereof,” &c., “ there have been, and still are (ex-  
 cept and subject as hereinafter mentioned,) certain ancient lands and tene-  
 ments situate in the township of Layton with Warbreck aforesaid in the  
 county of Lancaster aforesaid, called the Gyn, being the same lands and  
 tenements in the said indictment mentioned, and by reason of the same  
 Thomas Bamber the younger’s tenure whereof it is by the same indict-  
 ment supposed that he the said T. B. the younger ought to restore, repair  
 and amend the said part of the said highway so being ruinous, broken  
 and in decay as aforesaid : and the same ancient lands and tenements  
 have during all the time aforesaid belonged unto and been holden by the  
 same T. B. the younger, and those whose estate he now hath, and at the  
 taking of the said indictment had, of and in the same, and still belong to  
 and are holden by the same T. B. the younger (except and subject as  
 hereinbefore mentioned :) but that the same township of Layton with  
 Warbreck adjoins to the sea coast and is liable to encroachments by the  
 sea ; and that the sea has, from time within living memory, made encroach-  
 ments in and upon the said ancient lands and tenements, and carried  
 \*281] away the soil \*and earth of the same, so that part of the space  
 anciently occupied by the said ancient lands and tenements was  
 at the time of the taking of the said indictment, and now is, occupied by  
 the sea : And that there was from time immemorial, and now is, (except  
 and subject as hereinafter mentioned,) a certain ancient common and  
 public highway leading and used as in the said indictment mentioned,  
 and part whereof passed and passes over the said ancient lands and tene-  
 ments : and that from time immemorial (subject and except as aforesaid  
 and as hereinafter mentioned) the same T. B. the younger, and all  
 those whose estate he now hath, and at the taking of the said indictment  
 had, of and in the said ancient lands and tenements, have restored, re-  
 paired and amended, and ought of right to have restored, repaired and  
 amended, and he the said T. B. the younger ought now to repair and  
 amend, so much of the same highway as passed or passes over the said  
 ancient lands and tenements : And that the encroachments of the sea have,  
 within living memory, from time to time extended unto and over the said  
 ancient highway, so that a portion of the land over which the said ancient  
 highway went now is, and at the time of the taking of the said indictment

was, covered by the sea and impassable; wherefore those whose estate the same T. B. the younger now hath as aforesaid have from time to time gradually removed the same ancient highway, and appropriated other parts of the said ancient lands and tenements for the site thereof, so as to keep the same along but on the landward side of the sea coast, and so that the public have had the uninterrupted use of a road for the purposes of the said ancient highway: and that the same road hath always been repaired by the \*same T. B. the younger, and those whose estate he hath as aforesaid, as or in lieu of so much of the said ancient highway: And that the said part of the said common and public highway mentioned in the said indictment, supposed thereby to be ruinous, broken and in decay, was, at the time when the same is by the same indictment supposed to be ruinous, broken and in decay, and still is, part of the said ancient highway so going and passing over the said ancient lands and tenements called the Gyn, and used by the public aforesaid, though going and passing over a different part of the same ancient lands and tenements from that formerly occupied by any part of the said ancient road, and now occupied by the sea as aforesaid: And that in the month of March last the sea made an encroachment in and upon the same part of the said common and public highway so supposed by the said indictment to be ruinous, broken and in decay, and washed and carried away large quantities of the earth and soil thereof; and that the same part of the said common and public highway thereby then and there became and was, and ever since hath been, uneven and very ruinous, broken and in great decay for want of due restoration, reparation and amendment of the same, so that the liege subjects," &c., "during the time last aforesaid could not go, return," &c. "with their horses, carts, and carriages along and over the same highway as they ought," &c., "in manner and form as in the said indictment specified: And that the same T. B. the younger hath not restored the same; but that a portion of the same part of the said highway now has, and ever since the said month of March last had, the earth and soil thereof washed away by the sea, and was and is thereby made impassable; and the \*residue of the said road thereby became and was, and is, too narrow for passage, and was made to stand, and now stands, at the edge of a precipitous bank of the depth of seventy feet or thereabouts, and shelving down to the sea at an angle to the horizon of forty-five degrees or thereabouts: and it would cost a very great sum of money to make a passable road over the same space that was occupied by such road up to the month of March last. But whether upon the whole matter," &c., "the said T. B. the younger is guilty," &c.

The record then stated a judgment of the Court of Quarter Sessions that the said T. B. the younger was guilty of the misdemeanors, &c., and that his fine was set and assessed at 1s., &c. And on this judgment error was assigned, on the grounds that the indictment was not sufficient in law to warrant the judgment, &c., or to convict him of the misdemeanors, &c. :

that on examination of the premises it does not manifestly appear that the said T. B. the younger was or is guilty, &c., but, on the contrary, it appears that he was not nor is guilty, &c.: and that judgment was given against him, whereas he ought to have been acquitted. Joinder in error.

*Cowling*, for the plaintiff in error, defendant below. It is difficult to collect from the verdict what particular liability is ascribed to the defendant: but the statements, even on the view most adverse to him, do not warrant the judgment. First: the indictment charges non-repair of an immemorial highway: but the verdict shows that no ancient highway existed, or at all events that the original line of highways did not exist, at

\*284] the time of the alleged nonfeasance. Secondly, the verdict \*does not show any neglect of the alleged liability by tenure. The defendant is charged as liable to restore, repair and amend a certain line of highway described in the indictment: but the case proved is, not that he has been bound to repair and has formerly repaired, but that he has, from time to time, provided a new line of way as the sea has encroached upon the old. The indictment is not framed upon that liability; and, if it were, the verdict does not show that the defendant may not have given the public a passage through some other part of his lands than that lately rendered impassable. The liability on which this judgment must be founded is not that which attaches to a proprietor bound to repair *ratione tenuræ*. That relates only to surface damage; here the defendant is called upon to restore sea banks, a duty which in general is incumbent on the level, and perhaps would have been so under the circumstances here stated, even if an individual had been bound to the ordinary repair of such banks: *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477, 484. In *Regina v. Paul*, 2 M. & Rob. 307, parishioners were indicted for non-repair of a highway which ran along the top of a quay on the sea shore: part of the quay had been washed away by the sea, leaving a gap which broke off the communication; and the defendants were indicted for not restoring this. MAULE, J., after commenting upon the nature of the alleged highway, said: "Whatever might be the duty of the parish as to a road so in existence and requiring repair, I do not think they are defaulters on this evidence. The interruption of the passage is not from the want of repair, but from the sea having washed away \*the wall or

\*285] embankment, and there is no longer any thing for them to repair. I do not think they are liable to rebuild the wall." And the defendants were acquitted. That is substantially that same case as the present.

*Baines*, contra. As to the first objection: the highway is stated in the indictment to be immemorial, but such an averment is unnecessary; note (4) to *Rex v. Sloughton*, 2 Wms. Saund. 158a, 6th ed.; and there was no need to prove it. "In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law;" *Rex v. Hollingberry*, 4 B. & C. 329: and this is exemplified in *Rex v. Jones*, 2 B. & Ad. 611. The liability to repair a road may be im-

memorial, though the road in respect of which the liability is enforced may not be so. If a proprietor, bound *ratione tenuræ* to repair, has changed the line of road for his own advantage, the condition on which he holds his land remains. But in fact the ancient highway may be said, in this case, to continue; for "a highway may be changed by the act of God; and therefore it hath been holden, that if a water which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old;" 2 Hawk. P. C. 154, (7th ed.) B. 1, c. 76, s. 4. This case differs from *Regina v. Paul*, 2 M. & Rob. 307. Here the defendant was chargeable under the grant by which he held; and moreover, by the situation of the lands, which are described as adjoining the sea, and liable to its encroachments, he was the person bound, *prima facie*, to protect the land against the operation of the waves, and, if for want of such protection a road had been washed away, to restore it. *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477, and the authorities there cited for the defendants, Com. Dig., *Sewers* (E. 3,) and 2 Bla. Comm. 262, tend to show that such is the defendant's liability, resulting from the situation of his lands, unless he can allege any extraordinary circumstance in excuse. [WIGHTMAN, J. There is no allegation on the record that his duty is to keep the sea out.] The situation of the lands is described; and the verdict states it to have been the defendant's duty to restore, repair and amend so much of the highway as passed over them. [COLERIDGE, J. Are not you asserting a different kind of prescriptive liability from that stated in the indictment; to repair, not a particular highway, but a highway in some direction or other, as varied by the action of the sea, and, if the line is altered, to repair the new line?] The condition imposed on the defendant when he took his land was to preserve the right of passage, and not suffer it to be impaired by his default. [COLERIDGE, J. Suppose all his own land were washed away; would he be bound to find a passage in another person's land? You are dealing with a prescription, as to which the law is strict. WIGHTMAN, J. What do you say the defendant is at this time bound to do?] To replace the old road. [WIGHTMAN, J. Do you say he must set out a new portion, or restore what has been washed away?] He is bound to restore the road. [COLERIDGE, J. The verdict does not show that he has not set out a new line.] The facts do not lead to that inference. It would be unjust that the defendant should retain the lands and be relieved from the burden. [\*286]

*Cowling*, in reply. It would be hard, on the other hand, if he were held subject to the burden, when all the land was washed away; and the argument for the crown must go to that extent. (He was then stopped by the court.)

Lord DENMAN, C. J. I think the defendant below is entitled to judgment. Both the road which the defendant is charged with liability to [\*287]

repair, and the land over which it passes, are washed away by the sea. To restore the road, as he is required to do, he must create a part of the earth anew. I do not rely much upon the argument that the ancient line of highway has been removed. But here all the materials of which a road could be made have been swept away by the act of God. Under those circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition; and none has been found.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Judgment reversed.

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\*OLLIVANT v. BAYLEY.

Plaintiff was the patentee and manufacturer of a patent machine for printing in two colours. Defendant saw the machine on plaintiff's premises, and ordered one, plaintiff undertaking by a written memorandum to make him "a two colour printing machine on my patent principle." In an action for the price, defendant excused himself from liability on the ground that the machine had been found useless for printing in two colours.

The judge, in summing up, told the jury that, if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that, if it was not a known, ascertained article, and defendant had merely ordered, and plaintiff agreed to supply, a machine for printing two colours, defendant was not liable unless the instrument was reasonably fit for the purpose.

*Held*, a proper direction; and, the jury having found for the plaintiff under it, this court refused to disturb the verdict.

ASSUMPSIT for goods sold and delivered, for work, labour and materials, and on an account stated. Pleas: Non-assumpsit except as to 20l.; and a payment into court of 20l., which plaintiff accepted. On the trial, before CRESSWELL, J., at the last summer assizes at Liverpool, the following facts appeared.

The plaintiff was the patentee and manufacturer of a two colour printing machine, which was called "Ollivant's Patent Printing Machine." The defendant, a cotton printer, called at the plaintiff's premises, and said he wanted a two colour machine with shafting, &c.; an estimate was sent him the next day; and he afterwards called again at the plaintiff's and ordered a two colour machine on the plaintiff's patent principle, but desired to have it stronger than one he had seen at the plaintiff's shop. The plaintiff gave him the following memorandum in writing. "I undertake to make you a two colour printing machine on my patent principle," (stating dimensions and prices:) "of course it is understood that you do the masonry," &c. The machine was put up on the defendant's premises, but failed, the colours running into each other and spoiling the work. The defendant's witnesses stated that, for this reason, it was of no use as

\*289] a two colour printing machine, and that "the defect was inseparable from a machine constructed as those of the plaintiff were.

*Chanter v. Hopkins*, 4 M. & W. 399, was relied upon for the plaintiff. The learned judge, in summing up, told the jury that, "if the patent two colour printing machine was a known, ascertained article, the defendant, having ordered one, must pay for it, whether it answered his purpose or not; but that, if it was not a known, ascertained article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price unless the machine supplied was reasonably fit for the purpose for which it was ordered." As to the apparatus connected with the machine, he left it to the jury to say whether it was constructed according to the defendant's directions, and whether it was reasonably fit for the purpose for which it was ordered. The jury found for the plaintiff.

*Wortley*, in this term,<sup>(a)</sup> moved for a rule to show cause why a new trial should not be had, on the ground of misdirection. It was held, in *Chanter v. Hopkins*, 4 M. & W. 399, that, if a purchaser has ordered a known article, specifically pointed out by him, he takes it on his own risk; but there evidence appeared, which is not found in the present case, that the purchaser knew the nature of the article which he ordered: here the utmost proof on that subject was that the machine had been openly exhibited on the plaintiff's premises, and seen there by the defendant. It did not appear that he had ever seen it tried. This case comes within the principle of *Brown v. Edgington*, 2 Man. & G. 279. [<sup>\*290</sup> Lord DENMAN, C. J. There the plaintiff was entitled to say that he did not receive the thing he contracted for.] That is so here. [WIGHTMAN, J. The defendant had Ollivant's patent two colour machine.] According to the argument for the plaintiff, if a man obtains a patent, a purchaser of the article is liable, whether it answers the purpose or not. TINDAL, C. J., said, in *Brown v. Edgington*, 2 Man. & G. 279: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing shall be fit and proper for the purpose for which it was designed." The defendant there was not the manufacturer; here the plaintiff is manufacturer and inventor. In *Shepherd v. Pybus*, 3 Man. & G. 868, (see p. 879,) the doctrine "that in every contract of sale there is an implied warranty, that the article sold is reasonably fit for the use for which it purports to be designed" was fully recognised; and the implication was held to arise, though there was an express contract in writing. The general doctrine, which must govern this case, was laid

(a) November 4th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

down by BEST, C. J., in *Jones v. Bright*, 5 Bing. 533.(a) “If a man sells an article, he thereby warrants that it is merchantable,—that it is fit for some purpose.” “If he sells it for a particular purpose, he thereby warrants it fit for that purpose.” “Reference has been made to \*cases  
 \*291] on warranties of horses:” “no prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen: and this distinction explains the case of *Bluett v. Osborne*, 1 Stark. N. P. C. 384, in which Lord ELLENBOROUGH held, that the defendant” (plaintiff,) ‘who had sold a bowsprit, was not responsible for a failure arising out of a latent defect in the timber.’ [WIGHTMAN, J. The plaintiff’s undertaking here is, expressly, “to make you a two colour printing machine on my patent principle.”] Still the contract is, substantially, to supply an instrument which shall be reasonably fit for printing in two colours. [WIGHTMAN, J. You contend that, if the principle is not really adapted to the purpose, he must send something not according to the principle.] The plaintiff undertakes that the article provided on the principle of his patent shall be useful for the purpose of printing in two colours. At least he is to send something which will so print. It can make no difference that the article is the subject of a patent; the purchaser cannot be liable merely on that account to pay, whether the article be useful or not [Lord DENMAN, C. J. He may have taken that risk upon himself, in ordering the particular article. He may be supposed to have examined it.] The defendant must be taken to have relied upon the skill of the plaintiff, not on his own knowledge. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court. After  
 \*292] stating the direction of the learned \*judge to the jury, his lordship said: We think this direction was right; and my brother CRESSWELL is satisfied with the verdict: therefore there will be no rule.

Rule refused

(a) See *Sutton v. Temple*, 12 M. & W. 52.

## WOOD v. CONNOP.

Assumpsit on a bill of exchange, alleged to be endorsed by defendant to plaintiff.

Plea, that the bill was endorsed by defendant in blank, and by him delivered to C. for the special purpose that C. should get it discounted for defendant, and for no other purpose; that defendant received no consideration from C.; that C. got the bill discounted by plaintiff and W. jointly, who delivered the money, being their joint money, to C., as the consideration for the delivery of the bill to them by C.; that C. delivered the bill to them jointly, and not to plaintiff solely, or with the intention of giving him a separate right of action; that defendant received no consideration from plaintiff

solely; and that the only consideration received by defendant and C., or either of them, was the said joint discount.

*Held* bad, on general demurrer.

**ASSUMPSIT** on a bill of exchange, made by defendant on 1st November, 1841, directed to H. A. Wells, payable to defendant's order, for 500*l.*, three months after date, (which period had elapsed,) endorsed by defendant to plaintiff, and not paid by Wells when due.<sup>(a)</sup>

**Plea**: that the bill of exchange, after the same had been drawn by defendant as in the declaration mentioned, and also after the same had been accepted by Wells, and before the same had become due or payable, to wit 1st November, 1841, was endorsed by defendant in blank, and was then, on the same day and year aforesaid, delivered by defendant, so endorsed in blank, to a certain person, to wit one W. W. Chandler, for a special purpose, to wit that the last mentioned person should obtain for defendant the discount of the bill, and get it discounted for defendant, and for no other \*purpose whatsoever. That the said person did not give to defendant, nor has defendant ever received from the said person, any value or consideration whatever for the endorsement and delivery to him of the bill. That afterwards, and before the bill became due, to wit on, &c., the said person did, in pursuance and performance of the said special purpose, apply to and request plaintiff to discount the bill for defendant: that plaintiff, upon such application and request, to wit on, &c., did, jointly with a certain other person, to wit one Williams, and not otherwise, discount the bill; and they, the plaintiff and Williams, then advanced and delivered to the said person, for the use of defendant, a certain large sum, &c., to wit 200*l.*, being the joint money of plaintiff and Williams, as the consideration for the delivery to them of the bill by the said person to whom the same was so delivered so endorsed in blank by defendant as aforesaid. And the same person then, to wit on, &c., in consideration of the said joint discount and advance, delivered the bill to plaintiff and Williams jointly, and not to plaintiff solely or alone, or with the intention of vesting in him a sole, separate and exclusive right of action on the bill, severally and apart from Williams. That plaintiff never gave, nor has defendant ever received of or from plaintiff, solely, any consideration or value whatever for the endorsement or delivery to him of the bill; and that the only consideration or value which defendant and the said person to whom he the defendant so delivered the bill so endorsed in blank, as aforesaid, or either of them, has ever received for the endorsement or delivery of the bill, was the said joint discount in advance of money by plaintiff and Williams, as in the plea aforesaid. Verification.

\*Demurrer, assigning for cause that, although plaintiff has declared as sole endorsee of the bill, and not upon an endorsement thereof made to plaintiff and Williams, or any other person, jointly, yet

<sup>(a)</sup> There were two other counts, to which defendant pleaded, and the plea was demurred to. The defendant's counsel abandoned this plea on the argument.

defendant hath not positively traversed or denied such endorsement to plaintiff, but hath specially pleaded that the bill was endorsed by defendant in blank, and delivered by defendant to the person, &c., to wit W. W. Chandler, and that the bill, so endorsed in blank, was delivered by such person to plaintiff and Williams jointly, and not to plaintiff solely or alone, or with the intention of investing in him a sole, separate and exclusive right of action on the bill severally and apart from Williams: and such plea amounts in law to a mere denial of the endorsement and delivery of the bill to plaintiff as the sole endorsee thereof, and ought to have been pleaded as such, and to have concluded to the country. Also for that the plea amounts to, and is, an argumentative traverse or denial of the endorsement alleged in the declaration, and ought, therefore, to have concluded to the country. Also for that defendant should have stated and shown that the endorsement and delivery of the bill, as in the plea mentioned and described, are the endorsement and delivery mentioned in the declaration. Also for that the plea does not sufficiently deny, or confess and avoid, the matter alleged, and is argumentative, uncertain and contradictory, and shows no colourable right of action in plaintiff in respect thereof.

Joinder in demurrer.

*W. H. Watson*, for the plaintiff. First, the plea does not meet the cause of action stated in the declaration. It is quite consistent with the plea that  
 \*295] the plaintiff may be \*the sole endorsee. The mere delivery of a bill, endorsed generally, to any party, makes him endorsee of the last endorser: and a party, by suing on such a bill, shows himself to be such endorsee; *Ord v. Portal*, 3 Campb. 239. Illegality in the obtaining of the bill, if properly shown, would be an answer; so would want of consideration, if specially set forth; but here the plaintiff may have given legal consideration to Williams, or have become agent for Williams, so far as the latter is interested. Secondly, even if the defence be good, it amounts to a denial that the plaintiff is endorsee, and is therefore bad on the ground specially assigned; *Marston v. Allen*, 8 M. & W. 494; (a) *Adams v. Jones*, 12 A. & E. 455.

*Erle*, contrà. First, as to the merits. If, as is suggested, the plaintiff took the bill in the character of endorsee from Williams, or (if that can be) from Williams and himself, that is proper matter for a replication. The plea, *prima facie*, negatives the endorsement to the plaintiff. In *Adams v. Jones*, 12 A. & E. 455, the court said: "A bill may be endorsed to a party in two ways; either by a special endorsement, making it payable to that party; or by a blank endorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party *as endorsee*, in order to constitute an endorsement to him. But this plea avers that the bill was endorsed in blank, and delivered to the plaintiff, not as endorsee, but as agent only for another to whom he was to

(a) See *Hayes v. Caulfield*, ante, p. 81.

deliver it, and who was the real endorsee. We think, therefore, that it is a constructive \*denial that the bill was endorsed to the plaintiff." [\*296]

An innocent discounter would undoubtedly acquire a title, as endorsee, by the delivery of a bill endorsed in blank; *Goodman v. Harvey*, 4 A. & E. 870. But here the plaintiff alone is not the discounter. [WIGHTMAN, J. Suppose the plea had stated the value to have been given by Williams only.] In that case the plaintiff's title would have been negatived. An allegation that defendant endorsed to plaintiff is not satisfied by proofs that defendant endorsed to J. S. who endorsed to plaintiff. [WIGHTMAN, J. Are not you confounding special with general endorsements?] At any rate a delivery to the plaintiff as endorsee must be alleged in such a case. That was done in *Arbouin v. Anderson*, 1 Q. B. 498. Secondly, though this matter might have been shown under a denial of the endorsement, it does not follow that it may not be specially set forth as matter of law.

LORD DENMAN, C. J. You need not argue the question of form; for we are against you on the general question. The plea shows no defence.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Judgment for the plaintiff.

### \*TORRENCE v. GIBBINS.

[\*297]

To a declaration complaining that defendant debauched J., being daughter and servant of plaintiff, and alleging damage by loss of service, defendant pleaded that J. was not the servant of plaintiff.

Held a good plea, on special demurrer assigning for cause that the plea amounted to not guilty.

DECLARATION for that defendant, to wit on, &c., and on divers other days, &c., debauched Josephine Amelia Torrence, the daughter of plaintiff, "who during all the time aforesaid was, and still is, the servant of the plaintiff;" whereby she became pregnant, till she was delivered, &c. special damage for loss of service, expenses, &c.(a)

Plea. "That the said J. A. Torrence was not the servant of the plaintiff, in manner and form," &c.

Demurrer, assigning for causes that the plea is argumentative and insufficient in this, to wit that defendant, instead of simply pleading that he is not guilty of the grievances set forth in the declaration, hath denied the same in a circuitous and argumentative manner, by alleging that the said J. A. T. was not the servant of plaintiff; for, if J. A. T. was not the servant of plaintiff, defendant could not be guilty of the grievance set forth in the declaration; and for that the plea amounts to not guilty, and ought to have been pleaded in that form.

(a) The recital of the summons did not state the form of action: there was no *vi et armis* in the body of the declaration.

Joinder in demurrer.

*Atherton* for the plaintiff. The fact of the service would be put in issue by a plea of not guilty. Such a plea puts the "wrongful act" in issue; R. Hil. 4 W. 4, Pleadings in particular actions, IV. 1, 5 B. & Ad. ix.; \*298] that is, either \*the act or that which constitutes its wrongfulness.

In trover, not guilty denies the conversion only, not the title; in an action for obstructing a right of way, the obstruction only, not the right: but in an action for a nuisance it denies "that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation." [Lord DENMAN, C. J. There is no illegality if there be no annoyance.] Then to which class does this action belong? If there be no illegality independently of some particular fact, that fact is put in issue. The mere seduction of the daughter is, legally speaking, no injury. It is not like a trespass to the person of the plaintiff, which *prima facie* is an injury. It may be that, if the relation could have been formally alleged by way of inducement, the plea of not guilty would have admitted it: that is so in trover. But here the form of the declaration makes the relation the gist of the complaint. The whole action depends upon the resulting damage, to which the relation is essential. The case resembles *Sutherland v. Pratt*, 11 M. & W. 296. [Lord DENMAN, C. J. There, unless the contract was made with the plaintiff, the alleged contract was not proved.]

*Byles*, Serjt., contra. The relation is, in effect, mere inducement. The case is the same as if the declaration commenced by reciting that the plaintiff's daughter was his servant. The analogy of an action for obstructing a right of way applies. In *Taverner v. Little*, 5 New Ca. 678, a declaration in trespass alleged that defendant was possessed of a cart and horse, and complained of injury done by negligent driving of them: and it was

\*299] held that \*not guilty admitted that the cart and horse were in defendant's possession. That decision was acted on in *Hart v. Crowley*, 12 A. & E. 378. It is not true that the wrongfulness of the act is put in issue by not guilty: *Frankum v. The Earl of Falmouth*, 2 A. & E. 452, decides the contrary. *Holloway v. Abell*, 7 C. & P. 528, is the only authority to be found in favour of the plaintiff: that was merely a decision at nisi prius; and the verdict there prevented the question from being raised in banc, as the jury affirmed the service. In an action for criminal conversation not guilty would not put the marriage in issue.

*Atherton* in reply. No attempt has been made to get rid of the distinction suggested between cases where the act is a *prima facie* cause of action and those where the damage arising from a particular relation is the very gist of the action. That distinction explains all the authorities cited on the other side. Thus the obstruction of a way is *prima facie* an injury. But there is no legal injury in seduction unless the relation of servant exist. [COLERIDGE, J. In an action for words injurious only in respect of the plaintiff's trade, not guilty does not put the trade in issue.] The example stated in the general rule as to an action for nuisance applies.

LORD DENMAN, C. J. It seems to me that the example is rather against you. No one can complain of an act that is not offensive at all. But, besides, the owner is the only person who can complain; his ownership is essential to the right of action; yet that is not traversed \*by not guilty. So here the seduction injures the plaintiff because he is the master of the party seduced: and the same rule must be applied. [\*300]

WILLIAMS, J., concurred.

COLERIDGE, J. I am of the same opinion. I may mention that Mr. Justice LITTLEDALE, before the new rules, considered the service to be a necessary result of the residence of the daughter with the father. He once, in an undefended cause (a) in which I was counsel, where the residence was proved, held it unnecessary to give evidence of acts of service.

WIGHTMAN, J., concurred.

Judgment for defendant.

(a) *Maunder v. Venn*, Moo. & M. 323.

### The QUEEN v. The Inhabitants of WESTHOUGHTON.

Notice of appeal against an order of removal described the order by its contents, but did not state the names of the removing justices. On the trial of the appeal this was argued as a preliminary objection; and the sessions, without further hearing, confirmed the order, subject to the opinion of this court on a case, which submitted, as the point for decision, whether the notice was defective for the reason above mentioned; directing that, if this court held the notice good, the case should be sent back to the sessions, to be heard on the merits.

This court overruled the objection without argument, and allowed the case to go back to the sessions.

ON appeal against an order of two justices removing William Ramsdale, his wife and their children, from the township of Pennington in the county of Lancaster to the township of Westhoughton in the same county, the sessions confirmed the order on a preliminary \*objection to the notice of appeal, subject to the opinion of this court on a special case. [\*301]

This case set forth the order of removal, signed and sealed by two justices of the county, and the notice of appeal, which stated that the overseers of Westhoughton intended to prosecute and try an appeal "against an order dated the 27th day of January, 1842, under the hands and seals of two of her majesty's justices of the peace in and for the county of Lancaster, for the removal of William Ramsdale," &c., (describing the paupers) "from and out of," &c. The notice did not mention either of the removing justices by name. It proceeded to state several grounds of appeal, impeaching the order on the merits.

The case, after stating that the appeal came on for trial and an objection was taken to the service of notice, and overruled, proceeded as follows

“It was then objected by the respondent township that the notice of appeal did not sufficiently point to the order appealed against, inasmuch as the names of the justices alleged to have made the order so appealed against were not inserted in the notice of appeal; that the names of such justices (if any there were) ought to have been inserted in such notice of appeal; and that the omission to do so by the appellants was a defect which prevented the court from entertaining or trying the appeal. On this objection the Court of Quarter Sessions dismissed the appeal and confirmed the order said to be appealed against, subject to the decision of the Court of Queen’s Bench. The question for the opinion of the court is, whether the notice of the grounds of appeal was defective because it did not state  
 \*302] the names of the two justices who made the order of \*removal. If the notice of appeal was not defective, then the case is to be sent back to the sessions to be heard on the merits.”

*Baines*, who appeared in support of the order of sessions, contended that, according to the intimation lately given by this court (*a*), parties could not be heard upon a case which reserved the final determination, in a particular event, to the sessions. [Lord DENMAN, C. J. We have objected to taking upon ourselves part of the duty of a court of quarter sessions and then sending the case back to them: and we do not wish to encourage the practice of requesting us to do so. (*b*) But here the sessions have asked us whether a notice of appeal is sufficient if it does not mention the removing justices by name. The objection is about as good as if they had complained that the notice did not say what manufactory the paper came from on which the order was drawn up.] It must be admitted that no authority has been found for such an objection.

*Wortley and J. Peel*, contra, were not heard.

*Per curiam.* (*c*)

Case to go back to the sessions.

(*a*) See *Regina v. The Justices of Kesteven*, 3 Q. B. 810, and the cases there referred to, p. 815, and notes (*d*) and (*g*), *ibid.* Also, *Regina v. Worth*, 4 Q. B. 132, 134, note (*a*).

(*b*) See the next case.

(*c*) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

### \*303] \*The QUEEN v. The Inhabitants of STOKE-UPON-TRENT.

Pauper agreed in writing to work for B. & Co., in their trade. The written terms were, that pauper and others engaged “to serve B. & Co. from 11th November, 1815, to 11th November, 1817, at prices,” &c.; “to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants.” On the trial of an appeal raising the question of settlement by a year’s service under such hiring, it appeared that pauper had occasionally absented himself on holidays during the year.

*Held*, that a witness might be asked whether it was not the custom of persons employed in the particular trade, under contracts like that of the pauper, to have certain holidays in the year, and the Sundays to themselves.

The sessions quashed the order, subject to a case, in which it was stated that the evidence had been rejected, and that, if this court held it admissible, the appeal should

go back to the sessions to be reheard. This court refused to send the case back, and quashed the order of sessions.

On appeal against an order of two justices, removing Benjamin Till, his wife and their children, from the township or parish of Stoke-upon-Trent in Staffordshire to the parish, township, or place of Trentham in the same county, the sessions (October, 1840) quashed the order, subject to the opinion of this court upon the following case.

The pauper's father is settled in the parish of Trentham. In the month of November, 1815, the pauper was hired by and served Messrs. Bourne and Co., china manufacturers of Trentham in the respondent parish, from the 11th day of November, 1815, for nearly two years. After the pauper had been in the service some time he signed a writing in a book, and which was also signed by other workmen at different times, and was as follows.

“Plate and dish workers.—This day, agreed with Ralph Bourne to serve Messrs. Bourne, Baker and Bourne from the 11th day of November next until 11th November, 1817, at prices good out of oven as per opposite side. We agree to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants. Witness our hands, 10th day of January, 1815.”

\*This writing was signed by none of the masters, but was kept always in their custody. On the opposite side of the book was a statement of the prices to be paid for the making of the plates and dishes at per dozen. [\*304

It was objected on the part of the respondents that the above writing was not a valid agreement, because it was not stamped, and not signed by the masters: but the objection was overruled; and the writing was read.

On the part of the respondents evidence was offered to show that a universal custom prevailed amongst china manufacturers to allow holidays at certain fixed times of the year to the platers and dishers, and that at those times the latter could, notwithstanding the above writing in the book, absent themselves from their work without their masters' permission. This evidence was objected to as inadmissible, and was rejected.

The pauper was called by the appellants, and proved that he was hired by and served Messrs. Bourne and Co. for nearly two years from 11th November, 1815, as a plater; that during that period he had his Sundays to himself, doing no work on those days: that he absented himself from his work at Easter for two or three days, and at the wakes, and in August; and that after these holidays he returned to his work. The pauper also proved that he always had work of his masters' that he might have done on the play days.

On the part of the respondents the following question was asked the pauper. “At the time of the hiring or signing the book, was any thing said as to the holidays or Sundays that you were to have for yourself.”

This question was objected to as being a contradiction of the terms of the writing in the book. Also the following question. “Is it the custom of persons employed in the \*trade of dish-makers and plate-makers  
\*305] under such a contract as this to have certain holidays in the course of the year, and the Sundays to themselves?” This question was objected to on the ground that evidence of the custom of the trade was inadmissible.

The objections to both the questions were allowed by the court.

The questions for the opinion of this court were: 1. Whether the writing in the book was an agreement which ought to have been received by the court. 2. Whether, under the circumstances stated, evidence was admissible to show a universally prevailing custom among china manufacturers to allow platers and dishers holidays at certain fixed times in the year. 3. Whether the questions above stated were, or either of them was, admissible.

If this court should be of opinion that the writing was an agreement that ought to have been received, and that the evidence of the custom was inadmissible, and that both the questions were improper, then the order of sessions was to be confirmed. But if the court should be of opinion that the written evidence ought not to have been received, or that the evidence of the custom was admissible, or that either of the questions was proper, then the Court of Quarter Sessions were to rehear the appeal.

*Godson* and *Whitmore*, in support of the order of sessions. First: the agreement having been reduced to writing, evidence of the conversation which passed at the time was inadmissible. Secondly: (a) evidence of a  
\*306] \*supposed general custom could not be received to vary a written contract so express in its language as this. In some cases, where the hiring was in very general terms, the custom of the country has been considered as, impliedly, forming part of the contract; *Rex v. St. Agnes*, Burr. S. C. 671; *Rex v. Birmingham*, 1 Doug. 333: and this implied reference to custom is sanctioned in *Rex v. Horwicks*, 10 East, 489: but here the contract leaves no room for such a construction, and is consistent with the supposition that the master may not have consented to be bound by the custom. [COLERIDGE, J. If absences were proved, might not the sessions receive evidence to show whether they were from custom or from exception?] The agreement itself must be looked to. The evidence that the pauper always returned after his holidays and continued his work appears to show a dispensation with the service.

*F. V. Lee* and *E. Yardley*, contra. First, if there was no valid written agreement, evidence independent of the matter put in writing was admissible; and here the written agreement was not binding, for want of mutuality. (The further argument on this point is omitted, as the judgment did not turn upon it.) Secondly, assuming that there was a good written agreement, the questions proposed were admissible in explanation, though

(a) The other points raised at sessions were mentioned, but not insisted upon in this argument.

it would have been otherwise if the evidence to be introduced had tended to contradict the agreement in writing. In every contract of hiring there is some implied exception, which does not prejudice the contract, itself; and, "though an instrument appears, on its face, to be the sole exposition of the intention of the \*parties, and to be a complete instrument in all its parts, and though, in general, parol evidence is inadmissible to add to such an instrument, yet evidence of a custom regulating the matter, to which the instrument relates, may be admitted to 'annex incidents'(a) to it, though no allusion to any custom be made in the writing, provided the custom be not inconsistent with it:" 2 Phill. on Ev. 764, 8th ed.(b) Here it did not appear, when the question was put, that the answer would have set up any custom inconsistent with the written contract. And, the fact of absences from the service being proved, the evidence was admissible and material, to give the true character to such absences. The whole question, whether the hiring was exceptive or not, might have turned upon it, as in *Regina v. Threkingham*, 7 A. & E. 866. [\*307]

LORD DENMAN, C. J., (after reading the questions stated at the end of the case.) If the evidence had been admitted, it might have shown a custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract. And the supposed condition is not inconsistent with the written agreement; for that is merely to work at a trade from November 11th, 1815, to November 11th, 1817, which does not necessarily bind the party for every part of the whole year. The evidence, therefore, might have been receivable for the purpose of qualifying the contract. The sessions have requested us, if we think that the evidence was admissible, or either of the questions proper, to direct a rehearing of \*the appeal: but we do not approve of this manner of stating a case, and cannot consent to send the matter back to the sessions. The order was made as long ago as 1840; and the other points might probably be found in favour of the party for whom we now decide. The sessions, in stating the case, should have added a provisional finding in the event of our decision being one way or the other. The rule must be absolute for quashing the order of sessions. [\*308]

PARTESON, J. The evidence as to custom would probably have shown a usage so general that the contract must have been supposed to have reference to it. If the terms of the hiring had been "to serve day by day from the 11th of November next until the 11th of November, 1817," the evidence would have been contradictory; but that is not the case here; the terms of hiring are quite general.

WILLIAMS, J. I am of the same opinion. The agreement contains no stipulation that every portion of the time shall be at the service of the employers, nor any express provision as to time. If it had, the case would

(a) *Hutton v. Warren*, 1 M. & W. 466, (S. C., Tyr. & G. 646,) is cited.

(b) See vol. ii. part 2, c. 7, sects. 3, 4, of the 9th edition.

have been different. The principle acted upon in *Rex v. Scammonden*, 3 T. R. 474, and *Rex v. Lainden*, 8 T. R. 379, applies here; that parol evidence may be offered, not to contradict a written agreement, but to ascertain an independent fact explanatory of it.

COLERIDGE, J. I have always understood that general usage was evidence in a case of this kind, on the \*ground that its notoriety  
 \*309] makes it virtually part of the contract. The evidence offered here was within that principle, and not contradictory to the written agreement.

Rule absolute for quashing the order of sessions.

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The QUEEN v. The Inhabitants of CHARLBURY and WALCOTT.

Reported, 3 Q. B. 378.

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The QUEEN v. The Inhabitants of KINGSCLERE.

Reported, 3 Q. B. 388.

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\*310] \*BOSANQUET and Others v. WOODFORD and Others.

A certified copy from the Stamp office of the return filed there by a banking copartnership, under stat. 7 G. 4, c. 46, ss. 4, 5, is evidence, under sect. 6, that a person named in such return as a partner was so at the time of the jurat, though it be not proved that such return was delivered at the Stamp office between February 28th and March 25th, and though the return itself contain no date except that of the jurat, which is not between the above mentioned days, and is much later than March 25th.

The return was sworn to before Joseph Lomer, who was proved to be a magistrate of Southampton, but the words of the jurat were only "Sworn before me at the town and county of Southampton, 9th November, 1839. Joseph Lomer:" not further stating the authority to administer the oath. *Held* sufficient.

Judgment was entered up by a banking company against the public officer of another banking company, under stat. 7 G. 4, c. 46, ss. 9, 12; and a sci. fa. issued for the purpose of having execution, under sect. 13, against individual members. One of the alleged members obtained a rule nisi for setting aside the warrant of attorney: and the court thereupon ordered an issue to be tried, upon the question, among others, whether the shareholders of the latter company were indebted to the former in any and what sum. *Held*, that the defendants on such issue could not object that some parties on the record were members of both companies.

THE plaintiffs were the trustees of The London and Westminster Bank. The defendants were alleged, on the proceedings after-mentioned, to be shareholders in The Southern District Bank. The latter bank, having become indebted to The London and Westminster Bank, gave, by their public officer (Graham,) a warrant of attorney to secure such debt. The London and Westminster Bank signed judgment, and moved in this court for a scire facias against the defendant Woodford and other alleged share-

holders.(a) Woodford, on January 15th, 1842, obtained a rule to show cause why the judgment and warrant of attorney should not be set aside, and the shareholders of The Southern District Bank, viz. (naming those after-mentioned,) permitted to defend the action. This court made a rule (June 9th, 1842,) the material part of which is as follows.

"Upon reading," &c. "It is ordered that an issue be tried, in which issue the plaintiffs in this action shall \*be plaintiffs, and the said James Woodford, Ruth Lacey, George King Whitmarsh, Henry Hills, James Young, Jeremiah Blake, Thomas Powell and Thomas Graves shall be the defendants; such issue to be tried at the next assizes to be holden for the county of Wilts; and that such issue shall be for the purpose of trying whether, as regards the said J. Woodford," &c., "or any of them, any company or partnership called The Southern District Banking Company was ever constituted. If so, whether the said J. Woodford," &c., "or any of them, were partners in the said company. If they were, whether, as such, they are indebted to The London and Westminster Bank in any and what sum. And that all costs shall abide the event of the said issue in the same way as if the said issue was an action of tort and that if the plaintiffs in the said issue succeed judgment shall be given for them on scire facias: and that all proceedings on scire facias be stayed in respect of any defendant that succeeds: and, in the event of any difference arising respecting the said issue, then that the same be settled by a judge at chambers." The rule of January 15th to be enlarged until the issue be determined. [\*311]

The plaintiffs declared accordingly in assumpsit, stating, by way of inducement, that plaintiffs and others carried on business as bankers in London under the style of the The London and Westminster Bank, and that a question arose "whether, as regards the defendants or any of them, any company or partnership called The Southern District Banking Company for Hants," &c., "was ever constituted; and, if it was, whether defendants, as regards the said London and Westminster Bank, were partners in the said company; and, if they were such partners, whether they are indebted to the said bank." Issues were raised in the usual form on these questions.

\*On the trial, before CRESSWELL, J., at the Wiltshire Summer assizes, 1842, the plaintiffs, in order to prove that Ruth Lacy was a partner in The Southern District Banking Company, put in a certified copy, from the Stamp office, of a return filed there on behalf of the company, under stat. 7 G. 4, c. 46, s. 4., setting forth (among other particulars required by sched. (A) of the statute) the names and places of abode of the partners. The jurat was: "Sworn before me at the town and county of Southampton, 9th November, 1839. Joseph Lomer."(b) The return had [\*312]

(a) See stat. 7 G. 4, c. 46, ss. 9, 12, 13. And, as to the practice, *Bosanquet v. Ransford*, 11 A. & E. 520; *Ransford v. Bosanquet*, 2 Q. B. 972; *Eardley v. Law*, 12 A. & E. 802.

(b) Prior returns, the last sworn March 8th, 1839, were put in as affecting other defendants, and objected to, but received. See the judgment, p. 318, post.

no other date; nor was any evidence given of the time when it was delivered at the stamp office to be filed. The plaintiffs proved that Mr. Lomer was a magistrate of Southampton at the date of the jurat. *Bompas*, Serjt., for the defendants, objected that the certified copy could not be evidence unless it were proved that the original had been delivered at the stamp office within the time prescribed by the statute ;(a) and, further, that the

\*313] return was not \*shown by the jurat to have been verified before a person having jurisdiction.(b) The evidence was received.

It appeared that two of the defendants were partners in The London and Westminster Bank; and on this ground it was contended at the trial that the plaintiffs could not have a verdict. The learned judge observed that the defendants might be debtors to The London and Westminster Bank within the terms of the issue, although the fact of their being partners might obstruct the plaintiffs in proceeding at law to recover the debt: and the jury, under his direction, found a verdict for the plaintiffs.

*Bompas*, Serjt., in the ensuing term, obtained a rule to show cause why a verdict should not be entered for the defendants(c) on the last objection; or new trial had on the ground of improper reception of evidence. In this term.(d)

Sir *W. W. Follett*, solicitor-general, *Erle* and *Butt* showed cause. As to the copy of the return: it came properly certified from the Stamp office; and the court will presume that it was deposited there at the right

\*314] \*time. The fact does not lie within the knowledge of the plaintiffs. And the enactment as to time of deposit is directory only. It is for the public benefit that the deposit should be made, and should be effectual; therefore, even if the return should have been delivered in too late,

(a) Stat. 7 G. 4, c. 46, s. 5, enacts: "That such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace, and which oath any justice of the peace is hereby authorized and empowered to administer; and that such account or return shall, between the 28th day of February and the 25th day of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid, to the commissioners of stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned."

Sect. 6 enacts: "That a copy of any such account or return so filed or kept and registered at the Stamp office, as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

(b) Other returns were objected to on this ground, and on the ground first stated.

(c) See the judgment, p. 321, post.

(d) The argument was begun November 8th and concluded November 20th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

it would not be deemed void. This view of the case is favoured by sect. 18, which, in case of neglect "to cause such account or return to be renewed yearly and every year, between the days or times hereinbefore appointed for that purpose," imposes a penalty on companies "for each and every week they shall so neglect to make such account and return." The actual time of deposit does not affect the merits of this case; it is sufficient if the parties named were partners at any time in the year for which the return was made. Sect. 6 directs that a copy of the return "so filed or kept and registered," not "so delivered," shall be evidence that all persons named therein as members of the company "were members thereof at the date of such account or return." The form in sched. (A,) referred to by sect. 4, contains no date but that of the jurat. Secondly, the objection that some parties are both plaintiffs and defendants is removed by stat. 1 & 2 Vict. c. 96, s. 1,(a) passed to amend stat. 7 G. 4, c. 46. And, the court having directed an issue between the present parties, it cannot now be contended that the parties are not proper ones. The question, whether The Southern District Banking Company were indebted to The London and Westminster Bank, is not affected by the fact that some of the plaintiffs are partners in both: the debt, which is the subject of inquiry, does not the less exist.

\**Bompas*, Serjt., *Crowder* and *Ogle*, contra. The return could not prove any persons named in it to be partners, except from the time when it was deposited. Stat. 7 G. 4, c. 46, s. 18, shows how material that time is considered to the regularity of other proceedings. The document filed is not "a copy of" "such account or return so filed or kept and registered" "as by this act is directed," unless it appear to have been deposited within the proper period. The yearly account of alterations in the company, a form of which is given in sched. (B,) professes to state the changes since the "registry of the said corporation or copartnership on the — day of — last," thus treating the act of registration, under sect. 4, or (which is the same thing) the depositing of the annual return under sect. 5, as that from which the return dates. The words "at the date of such account or return," at the end of sect. 6, cannot mean the date of the jurat. And, whether the return have any other date or not, there should at least be proof when, in point of fact, it was deposited. The question when return becomes complete is important, because it appears by *Ex parte Prescott, in re Phillips*, Mont. & Chitt. 611, and *Rawlinson v. Nuttall*,(a) that the return, when fully made, is conclusive against those whose names appear in it, till the next year. [\*315]

(a) Continued by subsequent statutes, and made perpetual by stat. 5 & 6 Vict. c. 85, which recites all the previous acts.

(b) Cited in *Harwood v. Law*, 7 M. & W. 204.

the date of the jurat might in the mean time cease to be so; yet the return

\*316] \*would prove him to be a partner down to the time when it was sent in. [PATTESON, J. The forms in schedules (A) and (B) do

not require any date but that of the jurat.] The return ought properly to be verified on oath and deposited on the same day. It cannot be supposed that a return sworn on the 9th of November is the return, prescribed by the act, which is to be delivered between February 28th and March 25th. The plaintiffs say that the act, as to this, is directory only; but, by the language of sect. 6, the proper deposit of the original is a condition precedent to the admissibility of a copy as evidence. Further, the return sworn to before Mr. Lomer was defective, because the jurat did not show authority in him to administer the oath: *Christie v. Unwin*, 11 A. & E. 373.(a) Lastly, the jury in this case could not legally find that

The Southern District Banking Company was indebted to The London and Westminster Bank, some persons being partners in both establishments: *Bosanquet v. Wray*, 6 Taunt. 597. It is no sufficient answer that an issue on this point was directed by the court. The issue must be subject to rules of law. In *De Tastet v. Shaw*, 1 B. & Ald. 664, where executors set up a retainer, under a covenant made by the testator in his lifetime to themselves and others, his partners, for the payment of a debt due to them, the court said: "The deed upon which the defendants rely, does not show any debt at law. But it was contended that it shows a debt in equity, and that a court of law ought to take notice of such a debt

\*317] and give effect to it. It is \*obvious, however, that justice can

not be administered without affording the plaintiff an opportunity of controverting the amount of the debt; and the only mode in which a fact can be controverted in an action at law, viz. by taking an issue to be tried by a jury, is impracticable in the present case; because the debt constitutes an item in a partnership account, and the partnership account must be taken in order to ascertain how much was due at the execution of the deed, and whether the sum then due has been reduced in any and what degree by the intermediate gains of the partnership business. Such an account cannot be taken by a jury, and consequently no issue could be taken on the debt on which the defendants rely." [PATTESON, J. This point was known to the parties, and must have been under the consideration of the court before the issue was directed.] Stat. 1 & 2 Vict. c. 96, s. 1, gives power to any member of a banking copartnership to sue such copartnership through its public officer, and renders him liable to be sued by them in the name of the public officer; and it provides that no action shall be defeated by reason of the plaintiff or defendant being or having been a member of the said copartnership. But that applies to cases where the partnership generally is plaintiff or defendant; not where

(a) Erle, for the plaintiffs, objected that this was not a point made in moving for the rule.

strangers are proceeding by scire facias against an individual partner, who, by the operation of this statute, if it had the effect contended for, would lose his set-off. *Cur. adv. vult.*

Lord DENMAN, C. J., in the vacation after this term, (December 9th,) delivered the judgment of the court.

This was an application to enter a verdict for the \*defendants, or for a new trial. We shall consider the latter branch of the application first. It arises out of the trial of certain issues directed by this court, of which the first was, whether, as regards the defendants or any of them, a certain company called The Southern District Banking Company was ever constituted: and, if so, secondly, whether, as regards The London and Westminster Bank (the plaintiffs,) the defendants were partners in the said Southern District Banking Company: and, if so, thirdly, whether they are indebted to the plaintiffs. And the motion is made in consequence of the admission of certain evidence to prove the affirmative of the second issue. That evidence was the return of shareholders, &c., to the Stamp office, in pursuance of stat. 7 G. 4, c. 46, by The Southern District Banking Company. And the question is, whether those returns were made in conformity to the provisions of that act, or are inadmissible by reason of their alleged deviation therefrom. And this, of course, leads us to the consideration of the sections of the act on which this question depends. [\*318]

We would premise, however, that as to three (the number received in evidence according to the learned judge's notes) the main objection prevails: as to two, there was the additional objection that the person before whom they purported to have been sworn did not describe himself in the jurat as such person as is required by the act to administer the oath. We think, however, that the substance of the transaction is that the party verifying the return should be *in fact*, duly sworn, and that therefore, if the party who administered the oath really had jurisdiction, those two returns (so far as *this* objection is concerned) were properly received.

\*The principal object of the act in question was to extend the power of corporations and copartnerships, under certain restrictions, in carrying on the business of bankers. Before any such corporation or company shall avail themselves of the benefit of the act, they are required to make a return, in the form of schedule (A) annexed to the act, wherein, amongst other particulars therein mentioned, are to be contained "the names and places of abode of all the members of such corporation or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership." It is then provided that the "*amount* or return shall be delivered to the commissioners of stamps," and shall be filed, and "entry and registry thereof," made in a book to be open to public inspection on payment of 1s. It may be observed, in passing, that the object of this (the fourth and principal section) obviously is to protect the public, and to facilitate a [\*319]

remedy against all persons composing such corporation or copartnership as is therein described. It is obvious also that *no time* for making this return is specified, except only that it shall be done before the corporation or partnership shall have the benefit of the act. Then follows the fifth section, on which the question arises: and it is thereby enacted that such account or return shall be verified on oath before *any justice of the peace* by one of the public officers of the corporation or copartnership, "and that such account or return *shall between the 28th day of February and the 25th day of March* in every year," be in like manner delivered by such officer as aforesaid to the commissioners of stamps, to be filed, &c.,  
 •320] as aforesaid: and, by sect. 6, a copy of such account or return, \*certified by one or more commissioner or commissioners of stamps in the manner specified, shall be admissible in evidence in proof (amongst other things) "that all persons named therein as members of such corporation or copartnership were members thereof *at the date of such account or return.*" And the objection, founded, as already observed, upon the fifth section, is that such account or return is not shown to have been made within the prescribed period (between the 28th February and 25th March,) there being no date in any of the three except of the day when the oath was administered to the officer verifying his return, and in each case that date is not within that period. The objection, therefore, is certainly founded in fact; but whether it ought to have excluded all these returns is the question.

Now the substance of the transaction is the return, by the officer of the corporation or copartnership, of the names of their respective members. That return is the operative and binding thing. The commissioners of stamps have no power of altering such return, or means for the purpose. The office of stamps is a mere deposit, where the return, as it came, is directed to remain, without the possibility of variation. *The date* of the account or return is the material point of time. *That* is to fix who are and who are not members. No *other* date for any material thing to be done is any where alluded to: and, *whenever* it may be returned to the Stamp office, the only material date (as the sixth section declares) is that *when* the account or return is made, which is when the officer verifies it, and can be no other. We do not, therefore, think that the commissioners of stamps (who are merely passive in the transaction and have no authority  
 •321] to interfere as to the \*time or manner of making them) not having been shown to have received the returns within the specified time ought, in effect, to invalidate them; but that the clause in question ought to be considered as directory only. Seeing therefore, that they were intended, as has been already observed, to operate solely for the information and benefit of the public, and to bind the corporation or company of copartnership, we are of opinion that they were properly received in evidence.

The other object of the motion, to enter a verdict for the defendants,

is attended with less difficulty, and is more easily disposed of. We do not rely upon a preliminary objection that no leave appears by the notes of the chief justice to have been reserved for the defendants. This part of the motion proceeds upon the ground that, because certain individuals are members of each of the contending companies, therefore *no action* can be maintained by the one against the other; and in support of this proposition the case of *Bosanquet v. Wray*, 6 Taunt. 597, and other authorities to the like effect were cited. But this is *not* such an *action*. It is an *issue* directed by this court to ascertain certain facts with a view to ulterior proceedings; and there is no reason why it may not, for such purpose, vary the legal position and rights of the parties, as in issues directed by the Court of Chancery is constantly done. In such case nothing is more usual than that a special direction should be given not to set up partnership or bankruptcy, or that a witness wholly incompetent in point of law should be examined upon the trial. And, in the present instance, the third issue is expressly directed to \*try whether The Southern District Banking Company (the defendants) are indebted to the plaintiffs. [\*322 Upon such trial it is no answer to say, supposing that with truth it may be said, that the plaintiffs could not sue the defendants for any debt. That is not the nature of the inquiry.

Upon the whole, therefore, we are of opinion that the rule must be discharged. Rule discharged.

### LAWES and ANOTHER v. SHAW.

In a case where breaches must be assigned or suggested under stat. 8 & 9, W. 3, c. 11, s. 8, if the defendant does not rejoin, the ordinary course is for the plaintiff to sign judgment for want of a plea, strike out all the pleadings subsequent to the declaration, and suggest breaches, if the declaration itself does not state them. But this is only a rule of convenience; and, if the nature of the case requires that the pleadings, down to the default, should continue on the record, they ought to be retained.

Therefore, where to debt on bond conditioned to perform certain duties the defendant pleaded, generally, performance of the condition, plaintiff replied, alleging breaches, by not performing some of the duties, defendant suffered judgment by default, and plaintiff sued out a writ of inquiry, setting forth on the writ all the pleadings down to the end of the replication,

*Held*, that the course pursued was right, and that a statement of breaches appeared, of which the court executing the inquiry might properly take notice.

The lord chancellor, under stat. 1 & 2 W. 4, c. 56, made an order that each official assignee of the Court of Bankruptcy should pay into the Bank of England "all such sums of money as should come to his hands, as soon as they should amount to 100*l*," and should state in writing, among other things, "the name and description of the bankrupt or bankrupts to whose estate the money belonged."

*Held*, that it was well assigned, as a breach of this order by an assignee, that he, as such, received divers sums on account of divers estates of bankrupts, amounting in the whole to a sum over and above 100*l*, to wit, &c., and did not pay them in, &c.

**DEBT on bond.** The bond, set out on oyer, was given by John Shaw the defendant, James Clark and others, jointly and severally, to the plain-

tiffs, being the chief registrar and the other registrar of the Court of Bankruptcy. The condition (reciting that Clark had been chosen an official assignee, and that Shaw and the other obligors had agreed to become sureties for his due performance of the office) was, that Clark should well and truly perform all the duties of the said office required by the statute made  
 \*323] to establish a court in \*bankruptcy (a) or any other statute, &c., or required by any rule or regulation made or to be made in pursuance of the first mentioned statute, &c.; and well and faithfully execute all trusts reposed or which should be reposed in him as such assignee, or, in case of default therein, pay to the chief registrar, for the use of the person interested, &c., such sum or sums as should be chargeable upon him in respect of such default; or that defendant and the other sureties should severally make good to the chief registrar all defaults in such payments as last aforesaid to the several amounts for which they had agreed to become sureties. The defendant pleaded performance of the duties, execution of the trusts, and payment of all sums, &c., by Clark, following the words of the condition as to him.

Replication. The plaintiffs, as to the plea of defendant by him above pleaded, say: That, after the passing of the statute, &c., (a) to wit on 1st September, 1836, by a certain rule and regulation made in pursuance of the said statute, (b) &c., by the lord high chancellor, &c., it was ordered, &c., "that from thenceforth each official assignee of the Court of Bankruptcy should pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as should come to his hands as soon as they should amount to 100*l.*, and at the time of paying such moneys should state in writing, delivered therewith to the Bank of England, the date and the amount of the payment, the name of the official assignee making it, and the name and description of the bankrupt or bankrupts to whose estate the money belonged, and that it was to be placed to the credit of  
 \*324] the said accountant in \*bankruptcy; and that the official assignee should take a receipt for the same from the cashier of the bank, and carry it to the office of the accountant in bankruptcy, who would give a proper voucher for such receipt and that the money was placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the said accountant in bankruptcy." (c) The replication then stated that divers sums of money were paid to Clark as official assignee on account of estates of divers bankrupts, over and above the sum of 100*l.* on each of the said estates respectively; that he did not pay in the said moneys at the Bank of England; and that neither Clark nor the sureties made good the amount, though requested; and the same still remained unpaid, contrary to the tenor, &c., of the said condition. A verification was added. The replication then proceeded as follows.

"And, for assigning a further breach of the condition of the said writ-

(a) Stat. 1 & 2 W. 4, c. 56.

(b) See sect. 22.

(c) See the order in 2 Mont. & Ayr., Law and Practice of Bankruptcy, 353, 2d ed.

ing obligatory, according to the form of the statute in that case made and provided, the plaintiffs say that, after the passing of the statute in the condition," &c., "and in the said plea mentioned, and after the making of the said rule," &c., "as in the first breach mentioned, and while the said rule," &c., "continued in full force and effect, and whilst the said James Clark was and continued official assignee," &c., "and before the commencement of this suit, to wit on," &c., "divers large sums of money were paid to the said J. Clark as such official assignee as aforesaid on account of divers estates of divers persons who had theretofore respectively become bankrupts and had been declared \*bankrupts under certain commissions of bankrupt and fiats issued against them, of which said estates the said J. Clark then was official assignee as aforesaid, which said last mentioned sums of money amounted in the whole to a sum of money over and above the sum of 100*l.*, to wit the sum of 7700*l.*; and the said last mentioned sum of money had been paid to and had come to and then was at one time, to wit on the day and year last aforesaid, in the hands of the said J. Clark as official assignee of the said several estates last aforesaid: yet the said J. Clark did not nor would at any time pay the said last mentioned moneys, or any or either of them or any part thereof, into the Bank of England, but kept and detained the said moneys so received and held by him at one time as aforesaid as official assignee as aforesaid to an amount beyond the sum of 100*l.*, to wit to the amount in this breach mentioned, in his hands, to wit from the day and year last aforesaid until afterwards, to wit on the 10th day of April, A. D. 1841, when the said J. Clark resigned his said office as official assignee of the Court of Bankruptcy; and the said last mentioned sum of money then, to wit on," &c., "continued and remained and has ever since continued and remained and still does continue and remain in the hands of the said J. Clark." Averment "that, although the said J. Clark made default as aforesaid, yet he hath never at any time since the said last mentioned default paid to the chief registrar of the said Court of Bankruptcy or to any other person the said last mentioned moneys or any part thereof, although he was afterwards duly requested so to do:" nor hath the defendant nor the other sureties, or any or either of them, made good the default to any amount to the chief registrar, or repaid to him any part \*of the said moneys, although, &c., (averment of notice and request;) and the said moneys in this breach mentioned still remain due and unpaid; contrary to the tenor, &c., of the said condition, &c. Verification. Other breaches were assigned, which it is unnecessary to state.

The defendant rejoined specially; and the plaintiffs demurred; whereupon the defendant withdrew his rejoinder, and suffered judgment by default.

The plaintiffs then sued out a writ of inquiry of damages. The writ set forth the pleadings to the end of the replication, and proceeded as follows "And on the 4th day of January, A. D. 1842, to which day the

defendant had to answer the breaches aforesaid, the defendant said nothing further in bar or preclusion of the said action of the plaintiffs, whereby the plaintiffs remained therein undefended against the defendant. Whereupon it was considered," &c., (judgment for plaintiffs to recover their debt, with damages and costs.) "And, the said" plaintiffs "having prayed our writ to inquire into the truth of the said breaches, and to assess the damages which the said" plaintiffs "have sustained by reason of the said breaches, therefore, according to the form of the statutes in that case made and provided, we command you the said sheriff that you summon twelve," &c., "to appear, &c., "by their oath diligently to inquire," &c., "and to assess," &c.

The inquiry was executed before WIGHTMAN, J., at the sittings in Middlesex after Hilary term, 1843, and a verdict taken for the plaintiffs, with 999*l.* 16*s.* damages on the second breach, and 1*s.* damages on each

\*327] of the others. (a) *Crompton*, in the next term, obtained a rule \*calling on the plaintiffs to show cause why the writ of inquiry and all proceedings thereupon should not be set aside for irregularity, with costs; or why the verdict should not be set aside and a new inquiry had; or why the damages found on the second breach should not be reduced to 1*s.* The grounds of motion were: 1. That the record, at the time when the parties went to the inquiry, contained no proper suggestion of breaches that the judgment must be considered as signed for want of a plea, not of a rejoinder: that all the pleadings subsequent to the plea ought to have been struck out, and breaches suggested under stat. 8 & 9 W. 3, c. 11, s. 8; and that the breaches stated in the replication could not be noticed. 2. That, if the statement of breaches remaining on the record could be deemed a suggestion, the plaintiffs ought to have proved the bond and the lord chancellor's order, as in other cases where facts are suggested under the statute. 3. That the lord chancellor's order had been construed on the inquiry as binding the official assignee to pay in whenever the aggregate of sums received by him from different estates amounted to 100*l.*, whereas the order meant only that he should so pay when the amount received on any one estate reached 100*l.* In last Michaelmas term, (b)

*Platt* and *W. H. Watson* showed cause. The breaches in the replication were properly considered as forming part of the record for the purposes of the inquiry. It \*is not necessary, when the defendant abandons \*328] his rejoinder, that all the pleadings, up to the declaration, should be struck out. In *Petrie v. Fitzroy*, 5 T. R. 152, there being no rejoinder, the plaintiff entered up judgment by default as for want of a plea: a rule

(a) There had been a previous execution of the inquiry before the secondary, May 26th, 1842; but the inquisition was set aside on motion before this court, and cause shown, January 19th, 1843. The peculiar state of the record was noticed; but the decision did not turn upon it, the grounds of motion being misdirection and perverseness in the verdict.

(b) November 22d. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, *Js.*

was obtained to enter the plea and replication on the record; but a motion was afterwards made to discharge that rule, which the court did, observing that "to enter all the pleadings on the record," "generally speaking," "can answer no purpose, and is perfectly unnecessary:" but they admitted that, "whenever it becomes necessary to enter" them, "it may be done." The obligation laid upon the plaintiff in debt on bond, &c., by stat. 8 & 9 W. 3, c. 11, s. 8, to assign breaches, is explained in note (1) to *Gainsford v. Griffith*, 1 Wms. Saund. 58, 6th ed. The plaintiff must state the breaches complained of upon the record, and that by way of suggestion if it has not been previously done; but, if they are stated in the declaration, the jury may assess the damages upon them without a special venire: *Parkins v. Harkshaw*, 2 Stark. N. P. C. 381; *Quin v. King*, 1 M. & W. 42; S. C., Tyr. & G. 407. And if breaches are stated in the replication it is the same in effect as if they had appeared in the declaration. Note (1) to *Cutler v. Southern*, 1 Wms. Saund. 116, 117, points out the cases in which it is proper to adopt that mode of replying to a general plea of performance. It would be hard upon a plaintiff who had properly replied breaches that his replication should be thrown away, and a new statement of breaches rendered necessary, because the defendant withdrew his rejoinder and so was considered to have given up his \*plea. A declaration in contract or tort would allege the breach or trespass: and there, if the defendant pleads, the plaintiff replies, and the defendant fails to rejoin, the plea is not supported, because the answer to it is not resisted. It is only in that sense that the plea is abandoned by the defendant not rejoining. But that is inapplicable here, because the assignment of breaches is not in the declaration, but is made in the replication under stat. 8 & 9 W. 3, c. 11, s. 8. Suppose two breaches assigned on a bond conditioned for the performance of several covenants: the defendant, by not rejoining, allows the plaintiff to enforce the judgment as for those breaches: but could the plaintiff insist upon enforcing the judgment as if breaches of all the covenants in the condition were admitted? The defendant may have an answer to some of the breaches not assigned, as a release or a composition. If the breaches be ill assigned, cannot the defendant maintain error? Yet, if the plea and all subsequent pleadings be struck out, how can that be done? The judgment on nil dicit is put, by the statute, on a footing with a judgment on demurrer. Now suppose breaches were assigned in the declaration, and the defendant demurred: in that case he would admit the breaches; and the same consequence ought to follow from default in rejoining, after the breaches are once on the record. The case is analogous to that of a new assignment in trespass: where, if the defendant suffer judgment by default on the new assignment, no part of the record is struck out, but the different parts explain each other. If the replication here be struck out, it is difficult to say in what form the suggestion must be made; yet, without such suggestion, the writ of inquiry cannot be properly framed. If the

\*330] replication is to be entirely \*discarded, the question arises whether the plaintiff might suggest different breaches from those which were replied. The defendant does not suffer in any way from the whole record remaining. But, if this record be wrong at present, the objection should be taken by writ of error, not on motion. If there be merely an irregularity, the parties should have gone before a judge at chambers. If the replication continues to form part of the record, the objection that the bond and the chancellor's order were not proved is unavailing. Then, as to the effect of the chancellor's order. The construction given to it by the plaintiffs is the natural one; and the result of the objection, if well founded, is only that the verdict is entered on the wrong breach. (On this point *Watson* was stopped by the court.)

*Crompton and Cleasby*, contra. There is no such judgment known to the law as judgment for want of a rejoinder: where the replication is not answered, it is always considered that the plea is abandoned, and all after the declaration struck out; note (1) to *Bury v. Bishop*, 1 Wms. Saund. 318 b, 6th ed.; *Petrie v. Fitzroy*, 5 T. R. 152. It is urged that this is done only where the subsequent pleadings are unnecessary; but they do not appear to have been so in *Petrie v. Fitzroy*, 5 T. R. 152, more than here. The particular breach would not be confessed if it were assigned in the declaration, and judgment taken for want of a plea. There must still be an inquiry as to the breach; and why should it be otherwise when the breach is first assigned in the replication? [WIGHTMAN, J. Suppose the judgment had been entered for want of a plea, and breaches \*331] \*suggested for which you might have an excuse or discharge, the excuse or discharge could no longer be set up.] That, at any rate, is not a prejudice to the plaintiff. *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 381, and *Quin v. King*, 1 M. & W. 42; S. C., Tyr. & Gr. 407, show only that it is unnecessary to have a special venire where the breaches are assigned, not suggested. It appears from note (2) to *Roberts v. Mariett*, 2 Wms. Saund. 187, that there is little, if any, practical distinction between the case where breaches are assigned in the replication and that where they are suggested independently. The plaintiff, therefore, as the replication is struck out, should have replaced the assignment of breaches, which was in the replication, by a suggestion. This is not an objection which can be taken by writ of error; for the record does show a cause of action.

Further, the damages cannot, as is now attempted, be transferred from one breach to another.

As to the chancellor's order, the construction put upon it is inconsistent with its language. *Cur. adv. vult.*

LORD DENMAN, C. J., in the vacation after this term, (December 5th,) delivered the judgment of the court. After stating the objects of the motion, his lordship proceeded as follows.

The nature and validity of the objections will be best considered by adverting with some particularity to the state of the record, in order that it may be distinctly seen what was the subject of the inquiry, and in respect of what damages were assessed.

\*The declaration is in debt upon a common money bond, from which, together with the condition, being set out upon oyer, it appears that the bond was entered into by the defendant and others for the due performance of the duty of official assignee by James Clark, to which office the said Clark had been appointed. The defendant thereupon pleads performance *generally* by the said Clark. The plaintiffs in their replication assign several breaches, the 1st and 6th (a) alleging the receipt by Clark of divers large sums of money, and a failure by him in paying over the same according to the provisions of the said bond. The plaintiffs signed judgment for want of a rejoinder, and caused a writ of inquiry to be issued, reciting all the pleadings down to the end of the replication in which the breaches were assigned, and stating the default of the defendant in not answering the matters alleged in the replication although a day was given for the purpose, and the interlocutory judgment upon such default, and concluded in the usual form. [\*332]

The defendant contended that the proceedings, as shown by the writ, were irregular, and that none of the pleadings subsequent to the declaration should have been stated; and that, when the plaintiffs signed judgment for want of a rejoinder, both plea and replication were to be struck out, and the judgment was to be treated as a judgment for want of a plea, and not for want of a rejoinder, and that the plaintiffs were bound to enter a suggestion of breaches after their judgment by default, the previous assignment of breaches in the replication being a mere nullity; and they relied upon the case of *Petrie v. Fitzroy*, 5 T. R. 152.

\*We are, however, of opinion that there is no weight in the objection; and that, wherever the nature of the case requires that the previous pleadings down to the default should appear upon the record, they may and ought to be entered, and that it is only as a rule of convenience and to save expense that in ordinary cases, where the pleadings subsequent to the declaration have become useless, they are not entered on the roll. This is the distinction taken in the case of *Petrie v. Fitzroy*, 5 T. R. 152, relied upon by the defendant, but which is really an authority in favour of the plaintiffs. [\*333]

The statute 8 & 9 W. 3, c. 11, s. 8, obliged the plaintiffs either to assign or suggest breaches. They might have done so in their declaration, but did not, and were consequently bound to assign breaches in their replication if the defendant pleaded, or to suggest them if the defendant suffered judgment without pleading.

The defendant pleaded performance; and the plaintiffs in their replication assigned breaches, as they were bound to do; to which breaches the

(a) See p. 324, ante.

defendant admits he has no answer, but suffers judgment. The plaintiffs would not be at liberty to waive the breaches so assigned, to which the defendant had no sufficient answer, and afterwards suggest others to which the defendant might have an answer; and therefore it is essential, from the very nature of the case, that the previous pleadings down to the default should appear upon the record.

Upon this point the case of *Walker v. Priestly*, 1 Com. Rep. 376, though it has been overruled in other respects,<sup>(a)</sup> is an authority. It was there considered by the court that, in debt on bond for performance of covenants, where \*the defendant pleaded performance and the plaintiff  
\*334] assigned breaches, to which the defendant did not rejoin, the plaintiff could not waive the breaches which were entered on the roll, but might take judgment for want of a rejoinder.

The course pursued by the plaintiff appears to us not only to be the convenient, but the proper, course, and fully warranted by the two cases of *Petrie v. Fitzroy*, 5 T. R. 152, and *Walker v. Priestly*, Com. Rep. 376.

It was also objected that, according to the true intent and meaning of the lord chancellor's order, which is set forth in the first breach assigned in the replication, the said Clark was not bound to pay into the Bank of England, upon the receipt thereof, moneys over and above 100*l.*, &c' (His lordship here stated the third point made on behalf of the defendant.) To this objection the court, at the time of the argument, was disposed to attribute little weight; and upon further consideration we continue to think it to be unfounded. Upon the proper construction of the said order of the lord chancellor, we are of opinion that Clark was bound to pay over, as required, sums received over and above the sum of 100*l.* on each of the said estates respectively, and that the breach is therefore in that respect properly assigned, charging as it does the defendant upon the liability of Clark to pay over, in the manner stipulated for and required, the *aggregate* amount of all the estates.

The rule, therefore, must be discharged.

Rule discharged.

(a) See note (1) to *Gainsford v. Griffith*, 1 Wms. Saund. 58.

## \*The QUEEN v. MARY JOHNSON.

[\*335]

A married woman prosecuted another married woman in the Ecclesiastical Court: and the defendant was committed under a writ de contumace capiendo for non-payment of costs. This court on a defect in the writ, set it aside, and ordered the prosecutrix to pay the costs, the defendant and her husband undertaking to bring no action. The costs having been taxed, and not paid by the prosecutrix on demand, this court granted an attachment against the prosecutrix, absolute in the first instance.

PASHLEY, in Easter term, 1843, obtained a rule calling on the prosecutrix to show cause why the writ de contumace capiendo, issued in this case, should not be quashed or set aside with costs, and the defendant discharged out of custody as to her commitment upon the said writ. The affidavits set out the proceedings: and it appeared by them that the prosecutrix was Elizabeth Boyer, the wife of Edward Boyer, and the defendant the wife of George Johnson; that the libel had been for defamation; that the defendant had been condemned in costs; and that the writ had issued for her contempt in not paying them.

In Trinity term, 1843,(a)

*Hugh Hill* showed cause, but admitted that there was an insuperable objection to the writ, namely that it did not show the nature of the cause sufficiently to give the Ecclesiastical Court jurisdiction. As to this he referred to *Rex v. Dugger*, 5 B. & Ald. 791. He urged, however, that the rule should be discharged without costs; citing *Rex v. Ricketts*, 6 A. & E. 537, and *Rex v. Hewitt*, 6 A. & E. 547, note (a). And that, at least, the defendant must undertake not to bring an action.

\**Pashley*, contra, contended that, the proceeding having been taken against a married woman, the court would give costs; but he consented to an undertaking to bring no action.(b) [Lord DENMAN, C. J.] as to the means of enforcing an order for costs, referred to a MS. opinion of BAYLEY, J., *In the matter of Ruth Cope*.(c) [\*336]

*Per curiam*. The rule must be made absolute with costs: but the defendant must undertake to bring no action; and her husband should be a party to the undertaking.

(a) May 27th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) See *Regina v. Jones*, 10 A. & E. 576, 582.

(c) The following note is from Mr. Robinson of the Crown office.

Ruth Cope, a married woman, applied to be discharged out of custody upon an attachment; and the court granted a rule to show cause. Cause was shown, and the rule discharged with costs. A doubt having suggested itself in the office, as to awarding the costs either against Ruth Cope, as a married woman, or against her husband, who (though a codefendant in the cause) was no party to the application, Mr. Justice Bayley's direction was requested by Mr. Dealtry as to the mode of entering the rule, and his lordship wrote as follows.

"The husband cannot be ordered to pay the costs. The rule should be discharged with costs to be paid by the said Ruth Cope. A married woman is not to be entitled to harass a party with a vexatious rule, without being liable to the ordinary consequence of paying the costs if the rule is discharged. J. B. J"

Ordered: "That the writ de contumace capiendo, issued in this prosecution, be quashed, with costs to be paid by the prosecutrix to the defendant or her attorney, and the said defendant discharged out of custody as to her commitment upon the said writ: the said defendant and her husband, George Johnson, hereby undertaking not to bring any action in respect of the said defendant being taken and detained under the said writ." Costs to be taxed, if necessary, &c., by the coroner and attorney.

\*337] \*Pashley now moved for a rule for an attachment, absolute in the first instance, against the prosecutrix, on affidavit that the costs had been taxed, and demanded of the prosecutrix, and not paid. He contended that the prosecutrix would not be protected by coverture, and referred to the MS. opinion before mentioned, and cited also *Motam v. Motam*, 1 Rol. R. 426,(a) and *Tarrant v. Mawr*, 1 Str. 576.

*Per curiam.*(b)

Rule absolute, in the first instance.(c)

(a) S. C., more fully, as *Motteram v. Motteram*, 3 Bulst. 264.

(b) Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(c) See *Sparkes v. Bell*, 8 B. & C. 1.

## TAYLOR v. GEORGE ROLF, JOHN BUSH, WILLIAM JAMES, HENRY USHER, and WILLIAM MAZEY.

Where plaintiff in trespass obtains judgment on demurrer, and a writ of inquiry is executed, he is entitled to costs of suit, under stat. 3 & 4 W. 4, c. 42, s. 34, though the verdict be only for one farthing damages, and the judge do not certify; stat. 3 & 4 Vict. c. 24, s. 2, being inapplicable to such a case.

This was an action of trespass commenced against the five defendants by summons of November, 1840. On 16th February, 1841, Rolf, Bush and James pleaded not guilty; and, on 19th February, 1841, Usher and Mazey, by another attorney, pleaded not guilty, and also leave and license. The plaintiff, on the same day, replied a similiter to the pleas of not guilty, and traversed the plea of leave and license, adding a simi-  
\*338] liter, and on the 19th February notice of trial was given \*for the next Wiltshire assizes. At the Wiltshire assizes held in March, 1841, the defendants pleaded, puis darrein continuance, the bankruptcy of plaintiff. In May, 1841, the plaintiff demurred to the last mentioned plea; the defendants joined in demurrer; and judgment was given for the plaintiff. In November, 1842, an inquisition was taken before the sheriff of Wiltshire, when the jury gave one farthing damages.

In Hilary term, 1843, this court made a rule absolute for setting aside the inquisition, and ordered a new writ of inquiry to issue; and it was afterwards ordered that such writ should be executed before the judge of assizes for Wiltshire. It was executed accordingly, at the Wiltshire Spring assizes for 1843; and a verdict was again found for a farthing. On the taxation of costs, the defendants protested against the plaintiff re-

covering costs of suit, the damages being under forty shillings and there being no certificate. The master, however, taxed the costs of suit.

In last Trinity term, *Erle*, upon affidavit of these facts, obtained a rule to show cause why the master should not be at liberty to review his taxation by disallowing to the plaintiff his costs of suit.

The affidavits in answer stated that, after the notice of trial given, February 19th, 1841, the defendants Rolf, Bush and James obtained leave to plead de novo, with payment of 5*l.* into court; that the plaintiff took the 5*l.* out of court, and replied damages *ultra*, on which issue was joined: that the last mentioned plea was on the record when the cause was called on for trial at the Spring assizes 1841; that all five of the defendants then pleaded the bankruptcy of plaintiff *puis darrein continuance*; \*and that judgment on the demurrer was signed for plaintiff on 12th October, 1842. [\*339]

*W. H. Watson* and *Humfrey* now showed cause. First, independently of the 5*l.* paid into court, the plaintiff is entitled to his costs under stat. 3 & 4 W. 4, c. 42, s. 34, which enacts "that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf." No earlier statute took away costs on demurrer. Stat. 43 Eliz. c. 6, s. 2, and stat. 22 & 23 C. 2, c. 9, s. 136, applied only to particular kinds of action when the plaintiff recovered by verdict: (a) stat. 21 Ja. 1, c. 16, s. 6, did comprehend verdicts on a mere inquisition as to damages; but it applied only to actions of slander: except in those actions, costs were always given in cases of judgment on demurrer. Stat. 3 & 4 Vict. c. 24, s. 2, will be relied on. But the provision there is expressly confined to cases where the verdict of a jury is taken, "whether it shall be given upon any issue or issues tried, or judgment shall have passed by default." The introduction of the particular case of judgment by default shows that it was not intended to comprehend all cases of inquiry of damages. The reason of the distinction clearly was that a demurrer must always raise a question of law, so that there could be no need of a certificate that the action was brought to try a right. This distinction is \*illustrated by *Head v. Baldrey*, 11 A. & E. 906, [\*340] where it was held that R. Hil. 4 W. 4, General Rules and Regulations, 7, 5 B. & Ad. iv., does not enable a judge, by certifying, to compel a plaintiff to pay costs upon a count raising an issue of fact, but establishing only the same matter of complaint with a count on which there is a demurrer. But, secondly, 5*l.* has been paid into court: that satisfies the principle of stat. 3 & 4 Vict. c. 24, s. 2, and shows that the action is not frivolous, as fully as would be shown by a verdict giving damages to the same amount.

*Erle*, *contra*. As to the second point, the plea *puis darrein continuance*

(a) See *Harris v. Duncan*, 2 A. & E. 158; *Sheldon v. Ludgate*, Bul. N. P. 829.

waives all former pleas: and all that can be inferred from the present state of the record is that the plaintiff has recovered 4*l.* 19*s.* 11½*d.* too much. [Lord DENMAN, C. J. And that without the verdict of a jury. But can you get over stat. 3 & 4 W. 4, c. 42, s. 34?] The object of stat. 3 & 4 Vict. c. 24, s. 2, was to simplify the law of costs in actions of trespass when damages were nominal. The statute of Gloucester, 6 Ed. 1, c. 1, s. 2, gave the plaintiff costs where he recovered damages: and this made it necessary, in all cases, to have an inquiry of damages in order to obtain costs. Stat. 3 & 4 Vict. c. 24, s. 2, mentions a "writ of inquiry." The suggestion on the other side, that the general enactment must be considered as controlled by the enumeration of the particular cases, is unwarranted, and contradicts the principle of interpretation acted upon in

\*341] *James v. Salter*, 3 New Ca. 544, 553. The \*instances are merely illustrative. "Issue or issues tried" comprehends issues of fact found by a jury, issues of fact (as on *nul tiel* record) found by the court, and issues of law found by the court. It cannot be said that an inquiry, after an issue of *nul tiel* record, would not be within the policy of stat. 3 & 4 Vict. c. 24, s. 2. The statute does not become inapplicable merely because some facts are ascertained without a jury. Suppose, in an action of trespass, the defendant were to plead a right of way and a license, and the replication were to traverse the right of way, and new assign *extra viam*, and demur to the plea of license; and the defendant were then to suffer judgment by default on the new assignment,<sup>(a)</sup> and to fail on the traverse of the right of way, and on the demurrer: surely, if the jury gave a farthing damages, such a case would be within stat. 3 & 4 Vict. c. 24, s. 2. On a simple demurrer many very frivolous questions might arise. If, however, the party succeeding choose to take final judgment on demurrer, he may have the costs of his demurrer under stat. 3 & 4 W. 4, c. 42, s. 34: but, if he choose to go on, and take down an inquiry for damages, he cannot have more costs unless he recover real damages, or the judge certify.

Lord DENMAN, C. J. I think the master has done properly. The words in the early part of the provision of stat. 3 & 4 Vict. c. 24, s. 2, are general; but afterwards the objects to which it is to apply are distinctly specified. I do not deny that, by some very refined construction, it might be said that the sheriff, when he executes a writ of inquiry, does try an

\*342] issue: but the words "issue or issues tried," and "default," are well known in their ordinary sense, and do not comprehend an inquiry after judgment on demurrer.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule discharged.

(a) See *Harber v. Rand*, 9 Price, 386.

## The QUEEN v. The Recorder of EXETER.

Parish officers applied for an order of maintenance under stat. 2 & 3 Vict. c. 85, s. 1.; and the person charged as putative father removed the application to quarter sessions under sect. 3. On the opening of the case at sessions, it was objected that the applicants were the overseers of a parish forming part of a union under a local act, and that the guardians of such union, and not the parish officers, were the parties authorized to apply. The sessions, on this ground, dismissed the application, but without costs, thinking that they had no jurisdiction to grant them.

On motion for a mandamus to enter continuances and award costs: *Held*, that the application had been sufficiently heard to warrant granting costs under stat. 4 & 5 W. 4, c. 76, s. 73. And that, although the overseers were not the proper parties to apply for the order of maintenance, yet, having so applied, they were liable to costs.

MERIVALE, in this term, obtained a rule nisi for a mandamus calling upon the recorder of Exeter to enter continuances to the next general quarter sessions, on the application of the churchwardens and on the application of the churchwardens and overseers of St. Olave's, Exeter, for an order upon Nicholas Tuckett for the maintenance of a bastard child; and at such sessions to make an order for the costs of the said Nicholas Tuckett in resisting such application, to be paid by the said churchwardens and overseers. The following facts were stated on affidavit.

A notice addressed "to Nicholas Tuckett of the parish of St. Olave, in the city of Exeter," and signed "George Ferris," &c., "churchwardens and overseers of the poor of the said parish of St. Olave," was served upon Nicholas Tuckett, stating that they should apply to justices in petty sessions for an order of filiation upon the said N. T., whom they charged with being the "putative father of a certain male bastard child," &c. The said churchwardens and overseers (by their attorney) [\*343] attended the petty sessions; where Tuckett also appeared, and demanded that the charge should be heard at the next quarter sessions for the city, and entered into the necessary recognisances to appear, &c., and answer a charge made against him by the churchwardens and overseers of the poor of the said parish of St. Olave, &c., to abide the judgment, &c., and to pay all the costs incurred by the said churchwardens and overseers in bringing such charge before the said court, if the court should adjudge him to be the putative father, &c. The petty sessions did not proceed farther. The attorney for the complainants entered their application with the clerk of the peace as that of "the churchwardens and overseers of the poor of the parish of St. Olave;" and they and Tuckett respectively appeared by counsel at the quarter sessions. The opening of the case for the applicants was interrupted by the counsel for Tuckett, who objected that the churchwardens and overseers of St. Olave's were not the proper parties to apply: "that the said parish of St. Olave was a parish situate within a union, and was incorporated with the other parishes in the said city for the relief and maintenance of the poor of the said city and county of the said city under and by virtue of a certain act made," &c., (9 & 10 W. 3, c. 33, "for erecting hospitals and workhouses, within the city and

county of the city of Exon, for the better employing and maintaining the poor there,") "and that there then were guardians of the said union appointed and entitled to act as managers of the poor and in the distribution and ordering of \*relief to the said poor of the said city and county  
 \*344] of the said city from the poors' rate: and that consequently the said parish formed part of a union having guardians within the true intent and meaning of the several acts of parliament then and now in force respecting bastard children." The sessions, on argument, held the objection good, refused an order, and dismissed the application. Tuckett's counsel then applied for costs, to be paid by the overseers; but the recorder was of opinion that he had no power to order payment of costs. The order of sessions, after having recited the proceedings at petty sessions, detailed the latter ones as follows. "And whereas now here, at this Court of Quarter Sessions, the said churchwardens and overseers having made such application as aforesaid, and the said Nicholas Tuckett having appeared personally, this court hath proceeded to hear the said application of the said churchwardens and overseers: now this court, upon the hearing of such application, having heard all parties concerned and their counsel, and being of opinion that the said churchwardens and overseers of the poor of the parish of St. Olave aforesaid are not the proper parties to make the application, doth not think fit to make any order thereon; and this court doth refuse to order and direct that the costs and charges incurred by the said Nicholas Tuckett in resisting the said application shall be paid by the said churchwardens and overseers." The affidavit further stated that St. Olave's was in fact incorporated with other parishes in Exeter, for the relief and maintenance of the poor, as above stated; and that there were, at the time of the making of the said application, guardians, ap-  
 \*345] pointed under the act of 9 & 10 W. 3, who \*were entitled to act as managers of the poor, and in the distribution and ordering of relief to the poor of the said city and county from the poor rates.

*Regina v. Stamper*, 1 Q. B. 119, and *Regina v. The Justices of Monmouthshire*, 12 Law J. N. S. 126, Mag. C. (Bail Court, Q. B.;) S. C., 1 Dowl. & L. 145, were cited in moving.

*J. Greenwood* now showed cause. This case having been removed from special to quarter sessions under stat. 2 & 3 Vict. c. 85, s. 3, the costs are governed by stat. 4 & 5 W. 4, c. 76. By stat. 2 & 3 Vict. c. 85, s. 1, the order of maintenance should be applied for by "the guardians of any parish, or of the union in which any parish may be situate, or if there shall be no such guardians then the overseers of such parish." By stat. 4 & 5 W. 4, c. 76, s. 72, the application is to be made by "the overseers or guardians" of the parish, or "the guardians of any union in which such parish may be situate:" and sect. 73 provides that, "if upon the hearing of such application the court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged in

resisting such application shall be paid by such overseers or guardians." In the present case the guardians of the union established under stat. 9 & 10 W. 3, c. 33, were the persons pointed out by the words "guardians of any union" in stat. 4 & 5 W. 4, c. 76, s. 72: the interpretation clause, sect. 109, explaining the words "guardian" and "union," makes this clear: (a) they, consequently, were the proper persons to apply for the order \*of maintenance: and on that ground the application by the overseers and churchwardens was dismissed. If these were not right parties for the purpose of making the application, neither were they right parties for the purpose of paying costs; and, if so, the recorder had no jurisdiction to grant them. [COLERIDGE, J. Why may not the words "such overseers or guardians" in sect. 73 refer to the persons, whether overseers or guardians, who have, rightly or otherwise, applied under sect. 72?] The act distinctly prescribes who shall apply; the mere circumstance that persons applying are in fact overseers cannot give jurisdiction over them as parties. In *Regina v. Stamper*, 1 Q. B. 119, which was cited in moving for the rule, an entry of the intended application had been made by the right persons in the book of the clerk of the peace; the court and the party charged were ready to proceed; and the application fell to the ground because no one appeared to support it. *Rex v. Carston*, 4 Dowl. & R. 445, was a similar case. Here the court refused to proceed, because it held that the wrong persons had appeared. If the applicants were "such overseers" as are mentioned in sect. 73, and that refers, as has been suggested, to sect. 72, the application should have been heard, and, according to *Rex v. Frieston*, 5 B. & Ad. 597, a mandamus might now be granted to enter continuances and hear the application. [\*346]

*Merivale*, (with whom was *Cornish*,) contra, was stopped by the court.

LORD DENMAN, C. J. I think this was a hearing on which costs might be granted. And, if parish officers \*have improperly brought a person before the justices, and he, on a hearing at sessions, objects that they are not the proper parties, and the application is thereupon dismissed, that does not entitle them to allege that they are not proper parties to pay the costs. [\*347]

WILLIAMS, J., concurred.

COLERIDGE, J. The question as to granting a mandamus where justices, on a preliminary objection, have refused to hear, is very different from that which arises in the present case, whether the hearing was such as entitled the sessions to make an order for costs under stat. 4 & 5 W. 4, c. 76, s. 73. The concluding proviso of that section is strictly worded, and applies to this case.

WIGHTMAN, J. As soon as the case came on to be heard there was a "hearing" for the purpose of this clause. Rule absolute. (b)

(a) See *Regina v. Guardians of Lambeth* and *Regina v. St. Mary, Southampton*, page 513, post.

(b) See now stat. 7 & 8 Vict. c. 101, sects. 1 to 9.

## The QUEEN v. MARTIN and Another

Reported, 2 Q. B. 1037, note (a).

## Ex parte The Overseers of PONTEFRAC.

Reported, 3 Q. B. 391.

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## \*The QUEEN v. BURNBY.

Stat. 3 & 4 W. 4, c. 53, s. 112, enacts that no indictment shall be preferred or suit commenced for the recovery of any penalty or forfeiture under that or any other act relating to the customs, unless the suit be commenced in the name of the attorney-general or the lord advocate, or the indictment be preferred under the direction of the commissioners of customs, or the suit be commenced in the name of some officer of customs under the direction of the commissioners. Sect. 113 enacts that, if any prosecution be commenced for the recovery of any fine, penalty or forfeiture incurred under any act relating to the customs, the attorney-general or lord advocate may stop the proceedings by entering a nolle prosequi or otherwise, on such information. Stat. 3 & 4 W. 4, c. 51, s. 29, enacts that, on inquiry as to facts relative to the customs, &c., before a surveyor-general, evidence shall be given on oath, and, if false, shall be an act of perjury.

On indictment for perjury so committed,

1. *Quære*, Whether the indictment need be authorized, as directed by stat. 3 & 4 W. 4, c. 53, s. 112.
2. If it need, *quære* whether the indictment ought, on the face of it, to show the fact of the authority.

But at any rate this court will not quash an indictment not showing the authority, though the want of it appear by affidavit, but will leave the defendant to his demurrer, or motion in arrest of judgment, or application to the attorney-general.

Per Lord Denman, C. J. Sect. 113 of stat. 3 & 4 W. 4, c. 53, does not apply to such indictments; but, with respect to them, the attorney-general is left to his common law power.

SIR F. POLLOCK, attorney-general, in this term, obtained a rule calling upon the prosecutor to show cause why the indictment in this case should not be quashed, and all further proceedings stayed. The rule was drawn up on reading the indictment and certain affidavits. The indictment was for perjury alleged to have been committed on evidence given by the defendant before one of the surveyors-general of the customs, (a)

\*349] \*touching the alleged misconduct of John Poole, then a landing waiter at the port of London. It did not appear, on the face of

(a) By stat. 3 & 4 W. 4, c. 51, s. 29, it is enacted: "That upon examinations and inquiries made by any surveyor-general of the customs, or any inspector-general of the customs, for ascertaining the truth of facts relative to the customs, or the conduct of officers or persons employed therein, and upon the like examinations and inquiries made by the collector and controller of any out port in the United Kingdom, or of any port in the Isle of Man, or made by any person or persons in any of the British posses-

the indictment, that it had been preferred in the name of the attorney-general, or of the lord advocate of Scotland, or under the direction of commissioners, or in the name of any officer, of customs or excise.(a) By the affidavits it appeared that neither the commissioners of customs nor those of excise had authorized preferring the indictment.

\*The affidavits in answer showed that the indictment was preferred at the instance of John Poole, the party charged before the surveyor-general: that a true bill was found by the grand jury at the Central Criminal Court; that, before trial, the indictment was removed into this court by certiorari under the fiat of the attorney-general,(b) and that the case was made a special jury case at the instance of the solicitor of customs, and appointed for trial on 17th June, 1843; on which day the prosecutor was in attendance with his witnesses and counsel; when the attorney-general, who appeared as counsel for the defendant, withdrew the record.(c) [\*356]

*Cockburn, M. Chambers, and Poulden* now showed cause. The application is made on the ground that, since the oath was taken under stat. 3 & 4 W. 4, c. 51, s. 29, the indictment falls within sect. 112 of stat. 3

sions abroad appointed by the commissioners of his majesty's customs to make such examinations and inquiries, any person examined before him or them as a witness shall deliver his testimony on oath, to be administered by such of the surveyors-general, or such of the inspectors-general, or such collector and controller, or such person or persons as shall examine him, and who are hereby authorized to administer such oath; and if such person shall be convicted of making a false oath touching any of the facts so testified on oath, or of giving false evidence on his examination on oath, before any of the surveyors-general or inspectors-general of the customs, or such collector and controller, or such person or persons, in conformity to the directions of this act, every such person so convicted as aforesaid shall be deemed guilty of perjury, and shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury."

(a) Stat. 3 & 4 W. 4, c. 53, s. 112, enacts, "That no indictment shall be preferred or suit commenced for the recovery of any penalty or forfeiture under this or any other act relating to the customs or excise (except in the cases of persons detained and carried before one or more justices in pursuance of this act) unless such suit shall be commenced in the name of his majesty's attorney-general, or in the name of the lord advocate of Scotland, or unless such indictment shall be preferred under the direction of the commissioners of his majesty's customs or excise, or unless such suit shall be commenced in the name of some officer of customs or excise, under the direction of the said commissioners respectively."

Sect. 113 enacts, "That if any prosecution whatever shall be commenced for the recovery of any fine, penalty, or forfeiture incurred under this or any other act relating to the customs or excise, it shall be lawful for his majesty's attorney-general, or for the lord advocate of Scotland, if he is satisfied that such fine, penalty, or forfeiture was incurred without any intention of fraud, or that it is inexpedient to proceed in the said prosecution, to stop all further proceedings by entering a nolle prosequi, or otherwise; on such information, as well with respect to the share of such fine, penalty, or forfeiture to which any officer or officers may be entitled, as to the king's share thereof."

(b) See stat. 5 & 6 W. 4, c. 33 s. 1.

(c) It was stated, in moving for the rule, that the application was made in consequence of complaint, by the prosecutor's counsel, of the crown having withdrawn the record!

& 4 W. 4, c. 53, and therefore cannot be preferred without the sanction of the authorities there mentioned. But, first, this is not an "indictment" "preferred or suit commenced for the recovery of any penalty or forfeiture," under an act relating to the customs. It is true that, but for sect. 29 of stat. 3 & 4 W. 4, c. 51, which is an act relating to the customs, the oath could not have been administered nor the offence of perjury committed; but the indictment for perjury is not preferred for the recovery of any penalty or forfeiture. The statute makes the offence perjury, but leaves the perjury, when committed, to be dealt with, as other perjuries, by the ordinary legal proceeding. Stat. 3 & 4 W. 4, c. 53, is  
 \*351] entitled "An act for the prevention of smuggling;" and sect. 112 plainly refers to proceedings instituted for the recovery of penalties upon offences against that or similar acts. Sects. 75, 94, &c., have such offences in contemplation. The statute is, in many respects, a substitute for the repealed act for the prevention of smuggling, 6 G. 4, c. 108. It is true that an "indictment" is not the word now ordinarily applied to proceedings for the recovery of penalties: but that is not an incorrect use of the word, as appears by its occurring in stat. 21 Ja. 1, c. 4, s. 1, as descriptive of a proceeding by a common informer. Secondly, the indictment cannot be quashed for a defect not apparent on the face of it. Now it is not essential to the validity of the indictment, that it should appear to be brought under the authority in question. Even if it were essential, the defendant might be put to his demurrer; but such an allegation would be immaterial, and not traversable. Thirdly, in whatever way the objection is raised, the court will not interfere by its own act to stop the proceedings. *Rex v. Johnson*, 1 Wils. 325, and *Rex v. Belton*, 1 Salk. 372, show that the court will not quash indictments for offences of a heinous kind, such (according to the latter case) as perjury. The court will be the less ready to interpose here, because, if the objection really be good, the attorney-general, under sect. 113 of stat. 3 & 4 W. 4, c. 53, has power to stop the proceedings ex officio, and ought to do so on his own responsibility. That is the remedy to which the statute points: it would be very dangerous if parties accused of perjury committed  
 \*352] before the custom-house authorities had a right to stop the prosecutions in all cases.

Sir F. Pollock, attorney-general, *Thesiger*, *Jervis*, and *W. F. Pollock*, contra. The proceeding ex officio was not adopted, because the attorney-general was counsel for the defendant, and therefore preferred calling upon the court to act. First, this proceeding is under an "act relating to the customs," because it is only by stat. 3 & 4 W. 4, c. 51, s. 29, that the offence exists at all. The inquiry before the surveyor or inspector-general is in the nature of a private investigation; and therefore, without a special provision, evidence there given would not be punishable as perjury. Then the intention of stat. 3 & 4 W. 4, c. 53, was to put all indictments arising out of proceedings originating in the custom-house

regulations within the control of the officers of the customs, or the law officers of the crown. There was danger of collusive proceedings under those acts, by which punishment might be evaded. The provision is not confined to proceedings for penalties. Sect. 112 comprehends this case, the two proceedings pointed out are "indictment" and "suit commenced for the recovery of any penalty or forfeiture," either being "under this or any other act relating to the customs or excise." The word "indictment," is never applied in the act to proceedings for penalties: thus in sect. 75 the words are "action of debt, bill, plaint, or information." [WIGHTMAN, J. Sect. 53 speaks of indictments for misdemeanors created by the act, and subjects the offender to a "penalty or forfeiture," of 100*l*.] The party would not be indicted, properly speaking, for the recovery of penalty: he would be charged with the \*misdemeanor: the imprisonment or penalty would be the sentence of the court. Secondly, since an indictment not properly authorized is to have no effect, the authority ought to appear on the indictment in order to give it validity.] [COLERIDGE, J. Sect. 116 rather seems to assume that there will be such an averment.] A criminal information filed by leave of this court does not indeed set out such leave; but there the name of the court and the officer appear, which show that leave has been given, so as to satisfy stat. 4 & 5 W. & M. c. 18, s. 2; and the court has judicial knowledge of the leave granted. Here the court cannot see that the indictment is allowable: it ought therefore to be quashed. Thirdly as to the discretion of the court. To quash the indictment is a more convenient course than to put the party to a demurrer, or to direct an acquittal at nisi prius for want of proof of the authority. Sect. 113 of stat. 3 & 4 W. 4, c. 53, is inapplicable to an indictment: that is not a "prosecution" "commenced for the recovery of any fine, penalty or forfeiture." The attorney-general therefore has not, by any express words the power from which, according to the argument on the other side, the remedy specifically pointed out by the statute is to be derived. There is a marked difference between the language of sect. 112 and that of sect. 113.

LORD DENMAN, C. J. There are insurmountable difficulties in the way of making this rule absolute. I cannot think that, where the power of prosecuting is given for what stat. 3 & 4 W. 4, c. 51, makes perjury, such a proceeding comes within the words of sect. 112 of c. 53. The latter, I think, apply merely to the offences against \*the customs and excise, and not to the very grave offence of perjury. Next, supposing the words applicable, I much doubt whether the authority ought to appear on the face of the indictment. But, if that be essential, the defendant may have the benefit of the objection by demurrer or motion in arrest of judgment. Then, whether we should stay proceedings is in truth the same question again, and is one which we cannot dispose of in a summary way. To such an application we must apply some discretion: and I am not prepared to say that we ought to take the case up when no

mischief appears. If the commissioners can make out a case of oppression to the satisfaction of the attorney-general, he will exercise his powers. I agree with him that he might well be loath to prevent any person from vindicating his character: but, if that be applicable to him, having the means of investigation which he possesses, it applies with tenfold force to us, the court before whom the indictment is brought. Indeed I have no difficulty in saying that I do not think any case which could be laid before me on affidavit would induce me to exercise the extraordinary power which the legislature intrusts to the attorney-general. In sect. 113 the power of entering a nolle prosequi is given to the attorney-general in the case of any prosecution commenced for the recovery of fine, penalty or forfeiture incurred under the acts relating to the customs or excise: but neither that nor sect. 112 confers this power in the case of an indictment. And why not? Because the legislature, knowing that such power was already in his hands, left all the responsibility with him. We do not decide that the defendant has not a right to the protection sought. If he is entitled  
 \*355] to it, it is not for the court to suggest by what course he is to obtain it. But, being now called upon to exercise a discretion, we decline to interfere. I had much doubt in granting the rule nisi: and I am of opinion that we ought not to comply with the application.

WILLIAMS, J. The question is confined within narrow limits. It is, whether the protection, if necessary, should be given by the court or by the attorney-general. It is said that the perjury is committed, if at all, under peculiar circumstances, and before a person who, independently of the statute, has no power to administer an oath. Granted. But it does not follow that there might not, under these circumstances, be committed perjury of the gravest description: and I agree with my lord that it is one of the highest offences. I cannot conceive why it should be cast upon the court to stop a prosecution for so signal and malignant an offence, when the only reason that could be urged to us, namely that the proceeding may be abused, constitutes an immediate and direct reason for an application by the authorities to the attorney-general, whose power, no doubt, would be wisely exercised if it appeared that a prosecution was corruptly instituted.

COLERIDGE, J. This is an indictment for perjury, a very grave and serious offence. Without going into the old authorities, it is in the spirit of them all that the court should not interfere where there is doubt. Now is there not doubt here? If I pronounced any opinion, I should rather agree with the attorney-general that the case does fall within s. 112, of c. 53. But surely the point is susceptible of doubt and discussion. Then  
 \*356] comes the question, whether the authority ought to appear on the face of the indictment. It may be that the general rule of pleading makes this unnecessary, or that the particular enactment makes it necessary. Again I say, here is doubt enough to prevent the court from interfering. And we can do no injustice by abstaining. For, if, as the

attorney-general does and must allege, it is a condition precedent that the indictment should be instituted under the authority in question, there must be some way by which the objection may be made available. But it may be said that many cases may arise in which public policy requires that the proceedings should be stopped. That is possible ; though I cannot help saying that it must be a very strong case to require it in such a proceeding as the present. But, in such a case, the law has placed the power in the hands of a high officer, who, if he thinks fit, must exercise it upon his own responsibility, and not throw the responsibility upon the court.

WIGHTMAN, J. This is a case far too doubtful for the interference of the court. The prosecution is for an offence which, though under a customs act, is highly criminal. I can easily see that there may be many cases under sect. 112 of c. 53, in which the parties chiefly concerned are the officers of customs or excise. But there may be many others in which all individuals are concerned, as, for instance, cases within sect. 27 of c. 51, which makes a forgery on the receiver-general punishable by transportation for life. Such an offence might be in the highest degree detrimental to an individual : and ought an indictment for such a forgery to be stopped by the court upon a summary application ? Rule discharged.

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\*The QUEEN v. The Commissioners of Sewers for the TOWER [\*357  
HAMLETS.

On presentment, in a court of sewers, that M. S. received benefit in respect of his lands from a certain drainage, M. S. appeared and put in a traverse to the presentment, defective in form, but, as he alleged, raising a substantial defence. The clerk to the commissioners demurred specially. M. S. was heard in support of his traverse ; and the commissioners on September 7th, 1841, decided against him. He thereupon (at the same court) prayed leave to amend, and tendered a fresh traverse ; but the commissioners refused to receive it. A rate was then made, comprehending the land of M. S. He refused to pay, was summoned for non-payment, and showed cause : a view of the land was had ; and, after a final hearing, the commissioners, on July 25th, 1842, distrained. M. S., on May 10th, 1843, moved for a certiorari to bring up the proceedings, on the grounds that the commissioners ought not to have decided as judges on a demurrer virtually put in by themselves, and that, even if this was rightly done, the amendment should have been allowed.

*Held*, that the application came too late : but,

*Quere*, per Lord Denman, C. J., whether the objections, if made in time, would not have been valid : And, *semble*, per Coleridge, J., that the court of sewers ought to have permitted the amendment.

HURLSTONE, in last Easter term, (May 10th,) obtained a rule nisi for a certiorari to remove into this court a presentment made as after mentioned at a court of sewers for the limits of the Tower Hamlets (excluding St. Katherine's and Blackwall Marsh,) holden, &c., and also all ordinances, decrees and orders thereon, whereby a certain rate was made, assessed and levied on Michael Scales in respect of certain lands, &c. The following facts appeared on affidavit.

At a court of sewers holden in and for the limits of the Tower Hamlets, August 10th, 1841, a jury presented that Michael Scales and others named in a schedule to such presentment were owners and occupiers of lands, &c., in the parishes of St. John, Hackney, and St. Mary Stratford, Bow, in the Hackney Brook Level, and that the said lands, &c., held by M. Scales and the said other persons respectively were of the value, &c., and that they did, in respect of the said lands, &c., receive benefit or avoid damage by the support, maintenance, reparation, &c., of the sewers in the said level. Notice was \*given of the presentment, and  
 \*358] that a rate would be made for the support, &c., of the sewers of the said level, and for incidental expenses, at an adjourned court, to be holden at the office of sewers on 24th August, when any person might appear and traverse the presentment.

On that day Mr. Scales attended the court, and delivered a written paper, stated by him to be a traverse of the presentment, in the following terms.(a)

“To the commissioners of Hackney, and all others whom it may concern. Gentlemen: A presentment made to you on the 10th day of August, 1841, by a jury therein named, amongst other averments states that the houses and lands occupied by me and various of my tenants and other inhabitants of Old Ford in the parish of St. Mary, Stratford, Bow, in the county of Middlesex, either avoid damage or are benefited by a stream designated in such presentment as Hackney Brook Level, and that the said Michael Scales and his tenants and others, their lands and tenements, ought to be rated to such Hackney Brook Level according to a schedule or valuation set forth in such presentment. I hereby give you notice that I traverse such presentment, and say that such presentment is illegal and unjust in the whole and in every part of it, and therefore I put myself upon a jury of my country, and demand to be heard myself, by my tenants, and also by the inhabitants named in such presentment.

Michael Scales.

“Log Hall, Old Ford, 24th August, 1841.

\*359] “And, amongst other reasons, I derive no benefit nor \*avoid no injury from the Hackney Brook Level sewer; and that it is an unequal rate.  
 Michael Scales.”

Mr. Unwin, the clerk to the commissioners, deposed, on affidavit in answer to the rule “that, having known no instance within his own experience, and having been unable to find one after a careful inspection among the records of the court, of the trial of any traverse in the court of sewers, and conceiving that the said alleged traverse was vague,” &c., “and insufficient,” he, by direction of the commissioners, consulted counsel, who advised a demurrer, and it was drawn as follows.

(a) The traverse is given as stated on the affidavits in answer to the rule. The statement of it in Mr. Scales's affidavit was different in some slight particulars.

“ *The Queen* } In the Court of Commissioners of Sewers for the Tower  
                   v.       } Hamlets (excluding St. Katherine’s and Blackwall  
*Michael Scales.* } Marsh.)

“ And, as to the plea by way of traverse of Michael Scales to the presentment made on behalf of our sovereign lady the queen by a jury of the county of Middlesex at a court of sewers for the limits,” &c., “ holden on the 10th August, 1841, John William Unwin, clerk of the said court and of the commissioners of sewers for the Tower Hamlets aforesaid, being duly authorized and empowered in this behalf, on behalf of our sovereign lady the queen says that the said presentment ought not to be quashed, but ought in all things to be affirmed notwithstanding the said traverse, because he says that the said traverse is insufficient in law. And he shows to the court here the following grounds and causes of demurrer to the said traverse, namely: that it does not tender an issue or pray that the facts therein alleged or any of them may be inquired of by the country; nor does the said Michael Scales thereby put himself upon the country as to any \*fact or facts material to be tried; and no certain issue can be taken, nor can any trial of the merits be had, thereon; and the same is couched in vague, argumentative and uncertain terms, and is calculated to perplex and delay the proceedings of the court, and ought to be quashed and holden for nought. John William Unwin.” [\*360]

A copy of the demurrer was served on Mr. Scales, with notice that the next court would be holden on September 7th, 1841. On that day, Mr. Scales appeared, and was called upon by the court “to argue and support his said traverse,” and he addressed the court accordingly. The court (as Mr. Unwin stated) “thereupon ordered that the said demurrer be allowed, and the said traverse quashed, and that the judgment of the court should be entered thereon,” which was done as follows.

“In the Court of the Commissioners,” &c. “*The Queen v. Michael Scales.* On the 7th day of September, 1841, comes the said Michael Scales into this court, and says that his said plea by way of traverse to the presentment made by a jury of the county of Middlesex on the 10th day of August, 1841, is sufficient in law. Whereupon, the said Michael Scales being present in court here and having been heard in support of his said plea by way of traverse, and having fully considered and deliberated upon the premises, it is considered and adjudged by the court here that the said plea by way of traverse of the said Michael Scales is not sufficient in law, and that the same ought to be, and it is, quashed and holden for nought: and that the said presentment made as aforesaid ought to be, and it is, confirmed and approved of by the court: and that the said Michael Scales be taxed accordingly.”

\*After the court had given judgment, Mr. Scales prayed leave to amend. The prayer, as stated in his own affidavit, was for liberty, “upon payment of costs, to amend his said traverse in respect of any defect of form therein;” and he delivered to the commissioners an amended traverse, [\*361]

concluding with a prayer of trial by a jury: but the commissioners would not permit such traverse to be substituted; and Mr. Scales was not allowed to proceed to trial by a jury. On the same 7th September, 1841, a rate was laid upon the Hackney Brook Level, including the premises occupied by Mr. Scales. He refused to pay, was summoned for non-payment, and a view of the premises was had: a final hearing before the commissioners took place on June 21st, 1842, when they ordered that the rate should be paid; and, Mr. Scales still refusing payment, a distress was levied on his goods, July 25th, 1842.

The affidavits on each side contained statements on the merits of the case, which it is not necessary to detail.

Sir *W. W. Follett*, solicitor-general, *Kelly* and *Willes* now showed cause. If the commissioners were wrong in not permitting Mr. Scales to traverse, he might have applied for a mandamus; or, if the rate was illegally made, he might have tried its validity by action. There is no precedent for a certiorari to let in a traverse under circumstances like the present. It may be objected that the commissioners, who demurred to the traverse, ought not to have acted as judges of the demurrer: but this was unavoidable, by the nature of their office. They not only hold a commission, but are justices of oyer and terminer, acting by recognised forms of process, and authorized to pronounce decrees which have the effect of judgments: *Fitz. N. B.* 113, tit. *Writ of Oyer and Terminer*; \*362] *Com. Dig., Justices* (G 3;) *Callis on Sewers*, 163—167. A presentment before them differs from an indictment only because it is not on bill, but *ex mero motu*. A traverse, then, may be taken before them, as in other courts of oyer and terminer; and the subsequent proceedings would be analogous to those in such courts. That the traverse of a presentment in the court of sewers cannot be taken after decree appears from *Com. Dig., Sewers* (G;) *Callis*, 216, 217: the same rule would prevail there as before other jurisdictions. It is consistent with the practice, as shown by precedent, that the clerk to the commissioners should plead to the traverse of a presentment: 4 *Wentw. Pl.* 191; *Ramsey v. Nornabell*, 11 A. & E. 383. If any mistake in law appears by the record in the Court of Sewers, Mr. Scales may bring error. Further, the judgment was given in 1841, and the rate laid soon after; but this motion was not made till Easter term, 1843: it was too late then to ask that the proceedings should be removed.

*Erle* and *Hurlstone*, *contra*. Mr. Scales might have brought an action, but at the risk of treble damages, under stat. 23 H. 8, c. 5, s. 12. It was argued, and, as it seems, correctly, in *Birkett v. Crozier*, 3 Car. & P. 63, that a traverse is the proper mode of questioning a presentment made in the Court of Sewers.(a) The objections taken to Mr. Scales's traverse were on special demurrer only: and he should have been permitted to amend. He had not even joined in demurrer: the only entry on the re-

(a) See stat. 3 & 4 W. 4, c. 22, s. 46.

cord to that effect is made by the commissioners themselves. It does not appear that, on the traverse tendered by way of amendment, the real question might not have been tried by a jury, had not the \*commissioners by giving judgment in their own favour excluded the traverse. [\*363]

[COLERIDGE, J. You deny that they have any right to demur and decide the demurrer.] No instance of such demurrer has been found. At least, they cannot demur for mere matter of form. If their judgment on the demurrer is erroneous, it should seem that the party aggrieved by the decision cannot have a writ of error; Callis, 288; and see p. 167: and in *Commins v. Massam*, March, 196, two of three judges were of opinion that the proceedings were removable by certiorari, and not writ of error; which is confirmed by *Rex v. Commissioners of the Fens*, 2 Keb. 43, and *Smith's Case*, 1 Ventr. 66. In *Lord Dunbar v. The Commissioners of Sewers*, 1 Keb. 298, 313, the court said that the commissioners were "bound to no legal forms in strictness:" if so, it is just that the opposing party should have the same latitude. Callis says, p. 215, "that a traverse may be taken to a presentment made in this court of sewers, and herein this court may be resembled to a sessions of the peace." But, at sessions, a traverse, if informal, might be amended by the clerk of the peace; and that might have been done here, if necessary, by the clerk to the commissioners. [LORD DENMAN, C. J. Why did not you apply to this court sooner? WILLIAMS, J. Might not Mr. Scales have come to this court when the commissioners rejected his second traverse, if that decision was wrong?] The proceedings before the Court of Sewers lasted till July, 1842; and this motion was made in the Easter term following. The application is in the nature of a writ of error; and that would have been in time. The objections are on the face of the proceedings \*themselves. [\*364]

The commissioners, being in the situation of plaintiffs, have decreed, as judges, in their own favour; and they have debarred a party brought before them by presentment from his privilege of traversing, which is a statutory right, Callis, 215, 216, except in the cases there specified.

LORD DENMAN, C. J. The prosecuting party in this case has lain by so long that I think we ought not to interfere. If his land has been improperly taxed, deriving no benefit from the drainage, he may apply to the court when he is taxed again. I decide this solely on account of the lapse of time. I think that there is much weight in the objections taken to the proceedings.

WILLIAMS, J. Mr. *Erle* and Mr. *Hurlstone* have not answered the objection that when the second traverse was rejected Mr. Scales might have applied to this court at once to enforce the receipt of it, instead of suffering so long a time to elapse. If this burden is to be continued, there will be another rate; and he may then make an earlier application.

COLERIDGE, J. I certainly think, as at present advised, that it was the duty of the commissioners to look into the traverse and see if it did, in

substance, put in issue the matter which Mr. Scales proposed to try. But the more improper their proceeding may have been in this respect, the more incumbent was it on Mr. Scales to seek his remedy at once, and not lie by till a rate had been levied when an attempt to unrip the proceedings would produce much public inconvenience.(a)

Rule discharged.

(a) Wightman, J., had left the court during the argument.

\*365] \*The QUEEN v. The SHERIFF OF MIDDLESEX.

(WALKER v. The LONDON and BLACKWALL RAILWAY COMPANY.

On execution of an inquiry under a railway act, the sheriff stopped the case on a preliminary objection. A rule was obtained, calling on the sheriff to show cause why a mandamus should not issue, directing him to proceed with the inquiry. Counsel, instructed by the railway company, who had succeeded before the sheriff, opposed the rule; but a mandamus issued, and was obeyed. The prosecutor moved, under stat. 1 W. 4, c. 21, s. 6, for costs, to be paid by the company.

*Quære*, whether the company, not being immediate parties to the rule, were liable to costs. But

*Held*, that, at all events, they could not be subjected to costs for supporting a judicial decision in their favour

A MANDAMUS having issued in this case,(a) directed to the sheriff, he empannelled and summoned a jury; and an inquiry was held, and a verdict found for the prosecutor. In last Easter term a rule was obtained, calling upon The London and Blackwall Railway Company to show cause why they should not pay the prosecutor his costs of obtaining the rules nisi and absolute for a mandamus, and of the writ, and of that application. The affidavit in support of the rule set forth all the proceedings, and stated that the motion for a mandamus was opposed by counsel on behalf of the company.

Sir W. W. Follett, solicitor-general, now showed cause. The railway company were not parties to the motion for a mandamus: the court, therefore, has no jurisdiction to order payment of costs by them. In *Regina v. Bingham*, 4 Q. B. 877, where a mandamus had issued, commanding a justice to hear and determine a complaint against The Eastern Counties Railway Company, a motion for costs was made against the company; but

\*366] \*without success. The Court of Exchequer has refused to order payment of costs by a person not party to the record, though the action had been brought for his benefit.(b) Besides, the mandamus here was rendered necessary by a mistake of the undersheriff in his judicial capacity: the company ought not to be subjected to costs for upholding his decision in their favour.

(a) *Walker v. The London and Blackwall Railway Company*, 3 Q. B. 744

(b) See *Hayward v. Giffard*, 4 M. & W. 194. Also *Regina v. Greene*, 4 Q. B. 646, 650 and the cases cited, p. 652.

Sir *F. Pollock*, attorney-general, contra. The company are justly liable to costs, having led the undersheriff into the error of stopping the case on the first inquiry. In *Regina v. Bingham*, 4 Q. B. 877, this court seems to have admitted that the party really interested ought to pay costs; but the motion was made prematurely. The words of stat. 1 W. 4, c. 21, s. 6, are large enough to authorize an order for costs on parties interested either directly or indirectly.

LORD DENMAN, C. J. We do not enter into the question whether the company in this case be or be not, as a third party, exempt from costs. We must follow the general rule that, where a judicial decision has been given, the party who comes forward only to defend a judgment in his favour, and which he is entitled to suppose a right one, shall not pay costs.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule discharged.

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\*HOLMES v. NEWLANDS.

[\*367

Plaintiff sued out a *fi. fa.*, which was returned *nulla bona*, and afterwards an alias *fi. fa.*, under which goods were seized. An injunction issued to restrain the sheriff from selling, on the ground that the goods seized were not the property of the defendant; and a master in chancery so reported; whereupon the sheriff withdrew from possession. Plaintiff then issued a *ca. sa.*, on which defendant was taken, but discharged, on the ground that the alias *fi. fa.* had not been returned. Plaintiff then issued a *scire facias* on the judgment.

*Held* that, although it must be taken, after the discharge of the *ca. sa.* for the non-return of the alias *fi. fa.*, that something had been done under the alias *fi. fa.*, yet the *scire facias* ought not to be set aside for irregularity as having issued before the return of the alias *fi. fa.*, inasmuch as the defendant, if any thing had been taken under the alias *fi. fa.*, might plead the fact, whether that writ had been returned or not, and whether or not the plaintiff had been satisfied.

THE defendant, in person, on a preceding day of this term, obtained a rule calling on the plaintiff to show cause why a *scire facias*, issued in this cause at the suit of the plaintiff, should not be set aside.

The affidavit in support of the rule stated (a) that, in November, 1839, a *fi. fa.* for 445*l.* 5*s.* issued on behalf of the plaintiff on a judgment against the defendant, under which the sheriff of Surrey, on 28th November, 1839, took possession of all the goods and chattels in defendant's dwelling-house. That, on the same day, an injunction was issued at the suit of defendant's wife to restrain the sheriff from seizing any of the goods in certain houses, including the house above mentioned. That the sheriff remained in possession a few days, and then withdrew by order of plaintiff, and returned *Nulla bona*. That the injunction was afterwards dissolved, and another issued, restraining the sheriff from selling any of the property under any writ of execution that had issued or should issue

(a) See the statement of facts on the motion in the Exchequer Chamber in the same cause, 4 Q. B. 858.

in the cause. That on 30th December, 1839, the sheriff resumed possession, under an alias fi. fa., and continued in possession of the property till 31st December, 1840. That the last writ had not been returned.

\*368] That defendant was arrested, \*January 15th, 1842, on a capias on the same demand, and was discharged by rule of this court on 10th February, 1842; and that the capias was returned and filed. That a scire facias on the same demand was issued on 4th November, 1843.

In answer, it was deposed that the lord chancellor, on dissolving the original injunction, ordered that the sheriff should be restrained, (as above mentioned,) and that the execution should be withdrawn on the plaintiff in equity paying, or giving security for, the amount of the execution, which had not been done. That after the sheriff had resumed possession, the lord chancellor referred it to the master to ascertain what portion of the property belonged to defendant's wife; and the master reported, on 29th January, 1841, that none of the property was liable to the debts or control of defendant; which report was afterwards confirmed; and the sheriff, in consequence, withdrew from possession on 31st December, 1840, before the issuing of the ca. sa. That plaintiff had recovered nothing in satisfaction of the judgment; and that the ca. sa. had been issued on the supposition that the return of the alias fi. fa. was therefore unnecessary; but that the ca. sa. had been set aside for want of such return. That plaintiff had, in April, 1842, ruled the sheriff to return the alias fi. fa.; and that an attachment had issued against the sheriff for not returning it; but that the attachment had been discharged on the ground that the sheriff was not bound to make such return.

*Willes* now showed cause. The objection to the scire facias is, that it was issued while the alias fi. fa. was unreturned. But nothing had been  
 \*369] done under the \*alias fi. fa.; and therefore it was not necessary to return it. And the scire facias was in the nature of a second action. Where a writ of execution issues which has been preceded by another writ of execution, the first writ should be returned, in order to complete the claim of process, and because, if any thing has been levied under the first writ, the defendant cannot bring forward that fact, since he cannot plead to a mere writ of execution. But in scire facias it is otherwise: there, if any thing has been levied in the former suit, the defendant may plead the fact; *Com. Dig., Pleader* (3 L. 15.) Where such matter can be pleaded, the first writ need not be returned; *Green v. Elgie* 3 B. & Ad. 437. The defendant ought to be put to his plea; and the plaintiff may then demur, or take the opinion of a jury on the facts, instead of the matter being tried on affidavit.

*The Defendant*, in person, contrà. The affidavits do not show that nothing has been done under the writs of execution: the sheriff withdrew from possession under the injunction; but he had held for some time. The scire facias must show that execution remains to be made. Here, too,

the process against the person was set aside on the express ground that there had been no return of the alias fieri facias. *Cur. adv. vult.*

LORD DENMAN, C. J., on the following day, (November 25th,) delivered the judgment of the court.

This was a rule for setting aside a writ of scire facias as irregular, on the ground that a writ of fieri facias had \*previously been issued, executed and returned, and also an alias fieri facias issued but not returned, cause was shown on two grounds. First, it was said that nothing had been done under the alias fieri facias. But it appears that a capias ad satisfaciendum, which had issued subsequently, was set aside by this court, on the ground that the alias fieri facias had not been returned: we cannot therefore take it that nothing was done under the alias fieri facias. Secondly, it was argued, in opposition to the rule, that, when a scire facias is issued, it is pleaded to, and therefore no notice need be taken of a previous fieri facias, though it has not been returned, and the plaintiff has not been satisfied. No doubt the law is so, as appears from *Mountney v. Andrews*, Cro. Eliz. 237, and *Clerk v. Withers*, 2 Ld. Raym. 1072. It was contended that the scire facias, in this respect, resembled an action of debt on the judgment, to which a fieri facias under the original judgment may be pleaded, and in which therefore the writ will not be set aside for irregularity on the ground of a fieri facias having been issued on the judgment but not returned. That, we think, is a sound view. To a fieri facias or a capias ad satisfaciendum the defendant has no opportunity of pleading: the court therefore requires that there shall be a return, showing what has been done, before new process is allowed to issue. But this principle does not hold where recourse is had to a proceeding which is, in effect, a new action, and where the defendant may defend himself by pleading what has been done under the original judgment; and especially since a seizure under the former writ constitutes a good defence to the scire facias, though the \*sheriff has not returned the writ, nor the plaintiff been satisfied. The rule therefore must be discharged. [\*370] [\*371]

Rule discharged.(a)

(a) See *Holmes v. Newlands*, post; February 8th, 1844.

### SIMPSON v. RAMSAY.

If a writ of summons be directed to A. B. of S., in the county of Kent, "but to be heard of at Peele's Coffee House in the city of London," service of a copy of the process in London is bad, and will be set aside, though the latter part of the description be correct.

A RULE was obtained in this term, calling on the plaintiff to show cause why the writ of summons in this cause, or the copy and service thereof, should not be set aside, with costs.

The copy of the writ was directed "to David Allen Ramsay of Sandling

near Maidstone, in the county of Kent, but to be heard of at Peele's Coffee House, Fleet Street, in the city of London." The defendant, by his affidavit in support of the rule, stated that he resided at 39 Brewer Street, Maidstone, and not at Sandling, nor at Peele's Coffee House: and that he was served with the process in London. The plaintiff, in answer, swore that defendant had a house at Sandling, and that plaintiff had been told by a clerk of defendant there that, when in town, he was to be found or heard of at Peele's Coffee House; and plaintiff further stated that he saw and identified him at Peele's, and that he was followed thence, and served with the process in London.

*Humfrey* now showed cause. [WIGHTMAN, J. The Uniformity of Process Act, 2 & 3 W. 4, c. 39, s. 1, enacts that the writ or copy shall mention "the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be \*supposed to be;" "and every such writ may be served" "in the county therein mentioned, or within 200 yards of the border thereof, and not elsewhere." \*372] The service in London was warranted by the description "to be heard of at Peele's Coffee House," &c., "in the city of London." If the party was in fact at Peele's Coffee House, the act was sufficiently complied with. [Lord DENMAN, C. J. His residence is stated to be in Kent, and you serve him in London.] The object of the statute in requiring a particular address on the writ was only to guide the sheriff, so that he might be sure of taking the right person.

*J. Gray*, contra, was stopped by the court.

Lord DENMAN, C. J. The statute cannot be so construed.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Rule absolute, to set aside the copy and service, with costs.

END OF MICHAELMAS TERM.

## MICHAELMAS VACATION.(a)

[\*373]

## WHEELER v. BRANSCOMBE.

**Replevin.** Avowry for a quarter's rent in arrear. Pleas: 1. *Non tenuit*. 2. *Riens in arriere*. Issues thereon. Defendant was mortgagor in possession, having mortgaged to H. in 1834. Defendant, in 1838, demised the premises to plaintiff at an annual rent, payable quarterly; and in 1840 he gave H. an authority to receive the rent of the premises, described as occupied by plaintiff and belonging to defendant. H. communicated this authority to plaintiff, and gave him notice not to pay rent to defendant but to H. Plaintiff accordingly paid several quarters' rent to H.: but, shortly before Michaelmas 1841, when the quarter's rent mentioned in the avowry became due, defendant gave notice to plaintiff not to pay it to H. but to defendant. Plaintiff paid to neither; and defendant distrained. At that time, a small arrear of interest was due from defendant to H. under the mortgage. *Held*,

1. That the authority and payments of rent effected no change in the tenancy, and that the issue on the plea of *non tenuit* must be found for the defendant.
2. That the issue on the plea of *riens in arriere* must also be found for the defendant, since, if the facts proved amounted to a defence, they ought to have been made the subject of a special plea. But

*Semble*, that the facts did not amount to a defence.

**REPLEVIN.** Avowry for a quarter's rent due 29th September, 1841, from plaintiff to defendant. Pleas. 1. *Non tenuit*. 2. That no part of the rent, &c., was or is in arrear in manner and form, &c. Issues thereon.

On the trial, before WIGHTMAN, J., at the Devonshire Summer assizes, 1842, it appeared that, in 1838, the defendant demised the premises mentioned in the avowry to the plaintiff for three years certain from March 25th in that year, at an annual rent of 21*l.*, payable quarterly; and that after the expiration of the three years plaintiff continued to occupy the premises, paying the same rent. In 1834 the defendant had mortgaged the same together with other premises to one Hawkins; and in March, 1840, the mortgage still subsisting, he signed and gave to Hawkins an authority to receive the rents, as follows. "I hereby authorize Mr. John Hawkins, of," &c., "to receive the rents, quarterly or at any other time or times that he may think proper, \*of Mr. Wheeler and Mr. Eardley, for the houses that they now occupy belonging to me, situate in 'Torquay.'" Hawkins made the plaintiff acquainted with the terms of this authority, and also, in May, 1840, served him with notice not to pay to Branscombe "your former landlord of the same; he having agreed that the rents arising therefrom shall in future be paid to me, or to my order. J. Hawkins." After this notice plaintiff paid his rent to Hawkins until a short time before the rent avowed for became due, when the defendant directed the plaintiff not to pay any more rent to Hawkins, but

(a) The court sat in banc on the 27th and 28th of November, and from the 4th to the 9th of December, inclusive.

to pay it to the defendant. The plaintiff did not pay the rent avowed for to either party: whereupon the defendant distrained. The jury found that at the time of the distress a small arrear of interest (2s. 6d.) was due to Hawkins under the mortgage. The learned judge was inclined to think that the pleas were not proved, but permitted a verdict to be entered for the plaintiff, reserving liberty to move to have the verdict entered for the defendant.

In Michaelmas term, 1842, *Bompas*, Serjt., obtained a rule nisi accordingly.

*Crowder* and *J. Greenwood* now showed cause. There are two questions in this case; first, whether, on the facts, the plaintiff had any answer at law to the defendant's claim of rent: secondly, whether the pleadings were sufficient to let in such answer. It appears that the defendant had given the mortgagee an authority to receive the rent, and that the plaintiff had assented to this arrangement; which facts raise a sufficient answer to the defendant's claim. The authority, being coupled with an interest, \*375] could not be revoked as long \*as any part of the sum secured by mortgage remained unsatisfied; and the jury have found that 2s. 6d. did remain unpaid for interest. The defendant's estate was only that of a tenant by sufferance; and the plaintiff's tenancy to him was only a tenancy *sub modo*, subject to the authority. The mortgagee had a right to demand payment from the plaintiff; and the plaintiff had a right to pay the mortgagee; therefore no rent was in arrear to the defendant. This case is like *Dyer v. Bowley*, 2 Bing. 94: there, on pleadings similar to those now under consideration, and arising out of a distress in June, 1820, for rent due 25th March, 1820, it appeared that in 1796 Harcourt demised to Saul, for a term of sixty-eight years, premises which were then, and to the time of the distress, subject to a mortgage: in 1808 Saul assigned the term to Northwood, who underlet to the plaintiff: in 1818 Harcourt conveyed his reversion to Ramsbottom, under whom the defendant made cognisance: in 1819 the mortgagee gave the plaintiff notice not to pay rent to any person but the mortgagee's attorney. Northwood, who indemnified the plaintiff, had paid the rent to Harcourt, but, at the time of the distress, was Harcourt's general agent, and had paid the interest on the mortgage, to the amount of the rent reserved, from 1816 to April, 1820: none of the parties having recognised Ramsbottom as landlord, he stood only in the situation of Harcourt; and it was held that the undertenant might, under *riens in arriere*, avail himself of the payments. So, in the present case, nothing was in arrear to the defendant. [Lord DENMAN, C. J. Why not? The case cited shows that payment to the mortgagee \*376] would have been payment to the defendant so as to support \*the plea of *riens in arriere*. COLERIDGE, J. The mortgagee could have distrained only in the defendant's name.] The authority, being coupled with an interest, was irrevocable, and operated as an extinguishment of the original demand, so as to support the plea of *riens in arriere*. In *Crow*

*foot v. Gurney*, 9 Bing. 372, (a) it appeared that, Streather being indebted to Solly, and Gurney indebted to Streather, Streather requested Gurney to pay Solly whatever might be due from Gurney to Solly, which Gurney promised Solly to do when the amount should be ascertained; and it was held that this authority was not countermanded by the bankruptcy of Streather after the amount was ascertained, and that therefore the debt did not pass to Streather's assignees. ALDERSON, J., there rested his judgment on *Hodgson v. Anderson*, 3 B. & C. 842, 853, 854, where it was held that, although a creditor has a right to insist on payment to himself or his appointee, yet, having once given an order for the payment of his debt to a third person, he has no right to revoke that order, provided there be a pledge by the person to whom the authority is given that he will pay the debt according to the authority. The only question, then, on the point now before the court is whether the mortgagee could have sued the plaintiff for this rent: and that question must be answered in the affirmative; for the authority had been communicated to the plaintiff, and he had made several payments of rent to the mortgagee on the footing of that authority, so that, if the question had been put to the jury, they must have found that all the parties assented to the arrangement. In all the cases where the person claiming under the authority has failed, it has been for want of assent by one or other of the parties. In *Gaussen v. Morton*, 10 B. & C. 731, a copyholder had given a power of attorney to his creditor to appear for him and surrender his copyhold to the use of a purchaser, and to sell, and receive the purchase money: this power he attempted to revoke by deed and notice to the steward of the manor before any surrender; but the steward took a surrender to the use of a purchaser from the creditor: and it was held that the authority was irrevocable, and the estate vested in the surrenderee. And the only reason why, in *Watson v. King*, 4 Camp. 272, an authority to a creditor to sell his debtor's shares in a ship was held to be revoked by death was that a person could not be authorized to act in the name of a dead man. In *Wilson v. Coupland*, 5 B. & Ald. 228, all parties having assented to the assignment of a debt for money had and received, it was held that the assignee might recover against the original debtor in an action for money had and received. The doctrine is contained in the words of BULLER, J., in *Tatlock v. Harris*, 3 T. R. 174, 180: "Suppose A. owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them that A. shall pay C. the 100*l.*; B.'s debt is extinguished, and C. may recover that sum against A." It follows that the plaintiff here is entitled to recover if the pleadings are sufficient to let him into his case.

As to this latter point: in *Johnson v. Jones*, 9 A. & E. 809, (b) it seems to have been taken for granted that a tenant, in replevin against his landlord, may, under the general plea of *riens in arriere*, show payments to the

(a) See *Hutchinson v. Heyworth*, 9 A. & E. 375.

(b) See *Davies v. Stacey*, 12 A. & E. 506.

landlord's mortgagee. [WIGHTMAN, J. This plea denies in general terms that \*the rent was due, without saying to whom.] The plaintiff \*378] contends that no rent was due to the defendant: if that be so, the issue on *riens in arerre* in manner and form, &c., must be found for the plaintiff. In *Johnson v. Jones*, 9 A. & E. 809, payment to the mortgagee was considered to be a defence under this plea; the only difference in the present case is that the plaintiff has not paid, he is only liable to pay. [WIGHTMAN, J. That may make all the difference on this issue: the plea is, that plaintiff is in arrear to nobody: the evidence is, that he has not paid any body.] The equity of the case is with the plaintiff: and, if he cannot avail himself of the facts under this plea, the defendant will be taking advantage of his own wrong: the plaintiff could not have pleaded *nil habuit in tenementis*, or any thing equivalent; *Alchorne v. Gomme*, 2 Bing. 54. [WIGHTMAN, J. He might have paid the mortgagee as the defendant's agent. There is rent in arrear: the fallacy is in arguing that it is not in arrear to the defendant. In *Taylor v. Zamira*, 6 Taun., the whole rent had actually been paid to a party whom the landlord had authorized to distrain, and who had threatened to do so.] In *Wharton v. Walker*, 4 B. & C. 163,(a) where the party claiming under the authority failed from not having himself assented to the arrangement, LITTLEDALE, J., said: "Even if the parties had met and agreed, and the debt from Lythgoe had been discharged, still no money having been received by the defendant to the plaintiff's use, the latter must have declared specially on the agreement." So, here, the mortgagee might have declared specially against the plaintiff; but, if so, the debt from the plaintiff to the defendant is extinguished, and nothing is in arrear to the defendant.

\*379] *Bompas*, Serjt., *contra*. The tenancy having been created subsequently to the mortgage, the mortgagee could not, by merely giving notice to the lessee and requiring the rent to be paid to himself, make the lessee his tenant, or entitle himself to distrain for arrears of the rent: *Evans v. Elliot*, 9 A. & El. 342: and the instrument giving the authority could not have any such effect; for it asserts the tenancy to the mortgagor; and, if the mortgagee had distrained, he must have made cognisance under the defendant or avowed in his name. [He was then stopped by the court.]

LORD DENMAN, C. J. A tenant is often placed in an awkward position when called upon to elect between conflicting claimants. Here the tenancy was originally to the mortgagor; and the instrument authorizing the mortgagee to receive the rents does not affect to make any change in the tenancy: the payment of rent to him from time to time under such an authority did not create the relation of landlord and tenant between him and the plaintiff. This disposes of the issue under *non tenuit*. As regards

(a) It was there said that, to give the right of action, the debt to the assignee from the party assigning must be extinguished.

the plea of *riens in arriere*, the evidence shows that rent was in arrear: if there was such a binding engagement between the parties, for the payment of the rent to the mortgagee, as would be an answer to the defendant's claim of rent from the plaintiff, that ought to have been made the subject of a distinct plea: no case has been cited showing that such defence is available under *riens in arriere*.

WILLIAMS, J., concurred.

\*COLERIDGE, J. I am of the same opinion. The documents show the intention of the parties not to have been to dispose of the reversion, but to make the mortgagee the agent or bailiff of the mortgagor, with authority to receive the rents. It is not necessary to say with what interest this authority was coupled: it was probably a sufficient interest to make the authority irrevocable. But, assuming that to be so, and to be a good answer for the plaintiff, it is an answer which does not arise on the plea of *riens in arriere*: at the most, the facts show that rent was in arrear, which, under the authority, the plaintiff ought to have paid to another person. [\*380]

WIGHTMAN, J. I am of the same opinion as to the plea of *non tenuit*. As to the plea of *riens in arriere*, I think that such an authority would probably be irrevocable, and that, if the plaintiff had paid the rent to the mortgagee, this might have fallen within the cases which have been cited: but the difficulty is that the rent has not been paid: if the facts amount to an answer, they ought to have been pleaded in excuse of non-payment to the defendant.

LORD DENMAN, C. J. None of us mean to say that the authority in this case would support such a plea. A mere authority to pay is very different from an engagement binding on all parties. Rule absolute.

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The WEST LONDON RAILWAY COMPANY v. BERNARD.

Reported, 3 Q. B. 873.

## \*381]      \*IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

MAGNAY, ROGERS, and WALTER v. BURT.

No action lies against a sheriff or his officer for arresting a party attending under a summons from a court, though it be alleged that the party was thereby privileged, and that the defendants knew the fact, and made the arrest maliciously.

If a party be arrested, and the Court of Review order him to be discharged on the ground that he was in attendance under order of that court, but the officer arresting does not discharge him, the remedy (if any) against the officer is in trespass, not case, though malice be alleged.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

CASE, by the defendant in error against the plaintiffs in error.

The declaration charged that whereas heretofore, and before and at the time of the committing of the grievance hereinafter mentioned, the defendants Magnay and Rogers had been and were sheriff of Middlesex, and the defendant Walter was then an officer of the said other defendants; and that, before the committing, &c., on &c., an order was made by the Court of Review, in the matter of one Henry Charles Curlewis, of, &c., against whom a fiat in bankruptcy had issued, whereby the said Court of Review did order that it be referred to William Scrope Ayrton, Esquire, an officer of her majesty's Court of Bankruptcy, to inquire and state whether, at the date and suing forth of the said fiat, there was any and what debt due from the said H. C. Curlewis to plaintiff, the petitioning creditor under the said fiat, in the said order mentioned, sufficient in amount to support the said fiat, and that, for better making the said inquiry, all necessary and proper parties were severally to be examined before the said W. S. Ayrton, upon interrogatories or otherwise, touching the matters in question, as the said W. S. Ayrton should think fit, &c., and that the said W. S. Ayrton was to be at liberty to examine the said

\*282] H. C. Curlewis, \*the said petitioner in the said order mentioned, and the said plaintiff, the said respondent in the said order mentioned, or either of them: as by the said order, &c., will more fully appear.

That afterwards, and before the committing of the grievances, &c., to wit on, &c., the said W. S. Ayrton did, in pursuance of the said order, by a summons in writing signed by the said W. S. Ayrton, summon plaintiff (defendant in error) to appear before him on Tuesday the 28th day of June, 1842, at eleven o'clock in the forenoon, at the office of the Registrar in Bankruptcy, Quality Court, Chancery Lane, there to be examined by or before him the said W. S. Ayrton in the aforesaid matter of the said H. C. Curlewis. That afterwards, and before the committing, &c.,

to wit on, &c., plaintiff was duly served with the said summons, and in obedience thereto, he did afterwards, to wit, at eleven o'clock on, &c., the day and year in the said summons mentioned, attend at the said Registry office in his own person before the said W. S. Ayrton, in the aforesaid matter, under the aforesaid reference; and that afterwards, to wit on the day and year last aforesaid, and after plaintiff had been attending at the Registry office before the said W. S. Ayrton for the purpose aforesaid, and whilst he was leaving the said Registry office for the purpose of returning to his place of abode, and was returning to his place of abode, defendants, so being such sheriff and such officer as aforesaid, and before any reasonable time had elapsed for the return of plaintiff to his said place of abode, well knowing that plaintiff was then privileged from arrest, and disregarding their duty in that behalf, wrongfully and maliciously took and arrested plaintiff, by his body, and then kept \*and [383 detained plaintiff in custody for a space of time, to wit five days, after defendants had been requested to discharge plaintiff from and out of their custody, under and by virtue of a certain writ of *capias ad satisfaciendum*, directed to defendants Rogers and Magnay as such sheriff of Middlesex, whereby our said lady the queen commanded the said sheriff that he should take plaintiff, &c., so that he might have his body before the barons of her majesty's Exchequer, &c., to satisfy one S. L. Curlewis the sum of 300*l.*, which by the consideration and judgment of the said court was then and there adjudged to the said S. L. Curlewis for his damages, &c., as by the record, &c. That afterwards, to wit on, &c., by a certain order then made by the said Court of Review in the matter of the said H. C. Curlewis, a bankrupt, bearing date the day and year aforesaid, it was ordered that the sheriff of Middlesex should discharge plaintiff out of the custody of defendants Magnay and Rogers, as such sheriff of Middlesex as aforesaid, in which custody plaintiff was detained at the suit of the said S. L. Curlewis: of all which premises defendants had notice. Yet defendants, further disregarding their duty in that behalf, did not nor would then discharge plaintiff out of the custody of defendants Magnay and Rogers as such sheriff of Middlesex as aforesaid, but, on the contrary thereof, wrongfully, unlawfully and maliciously, and against the will of plaintiff, kept and detained plaintiff in their custody for a long time, to wit for a space of five hours, after they had notice of the said last mentioned order.

Plea, by Magnay and Rogers, not guilty. Issue thereon.

\*Pleas by Walter. 1. Not guilty. Issue thereon. 2. That Walter [384 had not notice of the order of the Court of Review. Issue thereon.

On the trial, before WILLIAMS, J., at the Middlesex sittings in Hilary term, 1843, a verdict was found for the plaintiff below on all the issues, with 25*l.* damages generally. In the same term (a) *Kennedy* moved for a

(a) January 13th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

rule for a new trial, (on account of an alleged misdirection,) or to arrest the judgment on the grounds stated in the argument on error. The court refused to arrest the judgment, being of opinion that an action on the case lay, since it appeared that the sheriff had maliciously and knowingly transgressed his duty. **PATTESON, J.** referred to the last sentence of Lord **MANSFIELD's** judgment in *Tarlton v. Fisher*, 2 Doug. 671. The court, also, after time taken to consider, refused the rule for a new trial. Judgment was entered for the plaintiff below.

Error on this judgment, having been brought in the Exchequer Chamber, the case was argued in last Easter vacation (May 13th, 1843) before **TINDAL, C. J., ERSKINE and CRESSWELL, Js., and PARKE, ALDERSON, and ROLFE, Bs.**

*Kennedy* for the plaintiffs in error, (defendants below.) The declaration contains two counts, or two breaches, but is insufficient in both.

As to the first count or breach. First, no action lies at all against the sheriff, for arresting a privileged person, at the suit of such person. In *Tarlton v. Fisher*, 2 Doug. 671; *Cameron v. Lightfoot*, 2 W. Bl. 1190. and *Crossley v. Shaw*, 2 W. Bl. 1085, it was held that trespass does not

\*385] lie. The reasons given by \*the court in these cases show that no action at all lies. In *Tarlton v. Fisher*, 2 Doug. 671, indeed, Lord **MANSFIELD** said: "Whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the case might be maintained, would be another question." But **WILLES, J.**, who thought the action would lie in the case of an arrest after notice (owing to the particular words of the act on which the plaintiff there relied, stat. 20 G. 3, c. 64, s. 2,) or an unreasonably long detainer after arrest and subsequent notice, took for granted that the form would be trespass. Indeed, in the case of an unreasonably long detainer, the plaintiff might reassign the excess, which shows that it is a substantive trespass. The party there was not, properly speaking, privileged, but made free from arrest by statute. The objection to the action, in any form, is that the privilege is not that of the party arrested but of the court. The proper proceeding is a writ of privilege, or a motion for the discharge of the party: *Walters v. Rees*, 4 B. Moore, 34, **BULLER, J.** says, in *Tarlton v. Fisher*, 2 Doug. 671, that, in cases of bankrupts and insolvents, "hundreds have been arrested, but there never was an instance of an action against the sheriff or his officers in such cases." Here the declaration alleges knowledge on the part of the plaintiffs in error: that means, knowledge of the facts stated in the inducement, and that this defendant in error had attended under order of the court, and was returning. But they did not know whether the defendant would claim his privilege, nor whether, if he did, the court would allow it. It is often disallowed, as where the attendance is not *bonà fide*; *Meekins v. Smith*, 1 H. Bl. 636.

\*386] And on these grounds the \*decision in *Cameron v. Lightfoot*, 2 W. Bl. 1190, which was a case of privilege, is expressly placed. The

sheriff would be liable for an escape if he abstained from arresting in a case where the privilege was not ultimately allowed; and he is not compellable to exercise the discretion at his own risk, as is urged by ASHURST, J., in *Tarlton v. Fisher*, 2 Doug. 671. In *Cameron v. Lightfoot*, 2 W. Bl. 1190, the court referred to two cases, *Clerke v. Molineux*, 1 Keb. 845; S. C., Sir T. Raym. 100, 1 Lev. 159, 1 Sid. 269, and *Vandeveldt v. Lluellin*, 1 Keb. 220, from which it appears that the arrest of a privileged person is not void. In *Sherwood v. Benson*, 4 Taun. 631, the sheriff had released a prisoner on production of his certificate in bankruptcy; and, an action for an escape having been brought, the Court of Common Pleas refused to stay proceedings. It is true that, if a plaintiff maliciously sue out a writ against a privileged party, he will be liable to an action on the case; *Whalley v. Pepper*, 7 C. & P. 506, (where LITLEDAL, J., said that the instances were not numerous:) though without knowledge it would not lie; *Stokes v. White*, 1 Cro., M. & R. 223; S. C., 4 Tyrwh. 786. So doubtful are questions of privilege considered to be, that a declaration merely alleging privilege generally, without showing the facts on which it rests, is bad on general demurrer; *Lloyd v. Wood*, 5 A. & E. 228. Secondly, if any action lie, it must be trespass. The proper course must be to declare for the arrest and reply the privilege to a justification under process; and a detainer after notice of the privilege might be new assigned. This is an attempt to waive a trespass and rely upon the malice as \*ground for an action on the case: but that cannot be done, any more than in an action for a battery. In *Smith v. Egginton*, 7 A. & E. 167, trespass was brought for false imprisonment; and the defendant justified under a writ in Chancery; to which the plaintiff replied that defendant was bound to discharge the plaintiff within a certain time after the arrest (under stat. 11 G. 4, & 1 W. 4, c. 36, s. 15, rule 5:) and it was held that, the original taking not being complained of, the action, if maintainable at all, should have been in case; and that, even if trespass were maintainable, the illegal part of the detainer ought to have been new assigned: but the court were strongly inclined to the opinion that no action lay at all. Here, however, the original taking is the act complained of.

Next, as to the second count or breach. That is clearly a trespass, if any cause of action at all. Every detainer is a continuing trespass. Several of the cases just cited apply to this breach. *Lambert v. Hodgson*, 1 Bing. 317, also shows that the illegal detainer may be new assigned as a substantive trespass. The subsequent detention is a distinct false imprisonment, as was said by BAYLEY, J. in *Martin v. Francis*, 1 Chitt. 241. In *Blessley v. Sloman*, 3 M. & W. 40, it was taken for granted that trespass was the proper remedy for such a detainer. So trespass is the proper remedy against a magistrate for maliciously granting a warrant without any information; *Morgan v. Hughes*, 2 T. R. 225. [TINDAL, C. J., referred to *Leame v. Bray*, 3 East, 593. The principle of that case is that

trespass is the proper remedy for injury which results immediately from the defendant's act: and that principle is also \*recognised in  
 \*388] *Turner v. Hawkins*, 1 B. & P. 472, where the action was held to be in case, and well brought, because the injury was caused by a non-feasance; and in *Ogle v. Barnes*, 8 T. R. 188.

Then, even supposing that case may be maintained on the first breach or count, still, the damages being entire, if the second breach or count be ground for an action of trespass only, there is a misjoinder. Neither part of the complaint can be treated as immaterial.

*Jervis*, contra. The declaration sets out fully the facts on which the privilege rests; so that the court, in accordance with *Lloyd v. Wood*, 5 A. & E. 228, can judge whether the privilege existed. The defendant below could not have traversed, by their plea, the fact that the privilege existed, except by traversing some of the special facts in the declaration. The question whether certain facts showed privilege was decided by the court, on general demurrer to the declaration, in *Newton v. Constable*, 2 Q. B. 157. It must therefore be taken, after verdict, that the plaintiff was protected. Then an action lies for an injury to the plaintiff, knowingly and maliciously committed as the record shows. Trespass does not lie: that is distinctly decided by *Tarlton v. Fisher*, 2 Doug. 671; *Cameron v. Lightfoot*, 2 W. Bl. 1190, and *Crossley v. Shaw*, 2 W. Bl. 1085. It is contended that the sheriff cannot know that the privilege is one which can be enforced. If that were so, the hardship which the sheriff is exposed to in executing his office is no sufficient argument in defence of a wrong exercise of it. Such an argument was ineffectually urged in *Balme*  
 \*389] \**v. Hutton*.(a) But on this record it appears that he does know the facts which raise the privilege, and has chosen to arrest, taking the risk on himself. Had he declined to arrest, or detain, the court would not, on affidavit, have stayed proceedings against him by the plaintiff in the original action; that is all which is decided in *Sherwood v. Benson*, 4 Taun. 631; though, in favour of liberty, the court will allow the right of the party arrested to be decided on affidavits. Again, if the sheriff, in the exercise of his judgment, had declined to assume the fact of the privilege, and had arrested and detained bonâ fide, the action might not have been maintainable. But he not only arrests, knowing of the privilege, but does so maliciously. Even where there is a legal justification, it is a material question whether the party acted in exercise of the right; *Lucas v. Nockells*.(b) *Porter v. Weston*, 5 New C. 715, is an instance of the right of action depending on the question of fact whether the defendant, exercising powers which were primâ facie legal, did so maliciously or not. Suppose trespass had been brought for this imprisonment,

(a) In Exch. Ch., 9 Bing. 471; 1 C. & M. 262; 2 Tyrwh. 620, (as *Hutton v. Balme*;) reversing the judgment of the Court of Exchequer, *Balme v. Hutton*, 2 C. & J. 19, 3 Tyrwh. 17. See *Balme v. Hutton*, 2 Y. & J. 101.

(b) In *Dom. Proc.* 10 Bing. 157; affirming the judgment in the Exchequer Chamber, *Lucas v. Nockells*, 4 Bing. 729; S. C., 2 Y. & J. 304.

and the defendant had justified under process, averring also in the plea the fact raising the privilege, his own knowledge of it, and his malicious motive: would not such a plea be bad? In *Oakes v. Wood*, 2 M. & W. 791, it is true, where *de injuriâ* was replied to a plea justifying the turning plaintiff out of defendant's house wherein plaintiff was making a noise and \*disturbance, it was held that the plaintiff could not show a malicious motive on the part of the defendant, if the fact of the noise and disturbance was proved: but that proves only that, where a party relies upon a legal right as an excuse, a mere denial of such excuse does not raise a question as to motive. Here the malice is relied upon, in the first instance, as the foundation of the action. [PARKE, B. Do you say that the action lies if the plaintiff never applies to be discharged at all?] It can make no difference, except as to the amount of damages, what is done after the arrest. The argument for the plaintiffs in error, if valid, goes to the extent of showing that no action lies though the party be afterwards discharged. Next, the authorities are express that trespass is not maintainable. Case is therefore the remedy. The complaint is that a colourable right has been improperly and maliciously exercised. In *Heywood v. Collinge*, 9 A. & E. 268, it was held that case lay for maliciously, and without reasonable cause, arresting the plaintiff, pending a former suit in which the plaintiff had been arrested and discharged, though it seems clear that the court there would not have held the action to be maintainable without the allegation of malice. Case is the ordinary form for maliciously arresting without probable cause. [\*390]

That which has been called the second count or breach is in truth only a continuation of the same complaint. It has no analogy to a second count. But, considering this as a separate complaint, the original taking is not complained of, but the officer's breach of duty in disobeying the order of the court, by which \*the defendant has suffered. On this principle, an officer of the customs was held liable to the owner of the goods for not signing a bill of entry to release the goods, upon tender of sufficient duty; *Barry v. Arnaud*, 10 A. & E. 646.(a) Here, too, malice is expressly alleged: and, even if trespass lies, it does not follow that case does not lie. [\*391]

*Kennedy* in reply. The first breach or count contains no allegation that the plaintiffs in error were requested not to arrest, on the ground of privilege, but only that they detained after request; there was therefore no notice of the intention to claim the privilege. [ALDERSON, B. *Luntley v. Battine*, 2 B. & Ald. 234,(b) seems to show that it is discretionary in the court to discharge a privileged party or not: how can the sheriff anticipate the discretion?] It is true that the action cannot be maintained without alleging malice: but that does not show that the action does lie where malice is alleged, nor that the form may be in case. And it is to be ob-

(a) See *Davis v. Black*, 1 Q. B. 900.

(b) See *Bartlett v. Hebbes*, 5 T. R. 686, and *Holiday v. Pitt*, 2 Str. 985, there cited.

served that in *Lucas v. Nockells*, 10 Bing. 157, even the judges who concurred in the decision guarded themselves against being understood to hold that the motive could be inquired into when there was a legal justification.

The latter part of the declaration perhaps discloses a cause of action: but the act there complained of is a trespass. The party doing the immediate illegal act is liable in trespass, as in *Andrews v. Marris*, 1 Q. B. 3, and *Carratt v. Morley*, 1 Q. B. 18. The action on the case for malicious \*arrest is not against the party immediately doing the act, but  
 \*392] against the party setting the law in motion. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The main question in this case, which has been brought before us by the plaintiffs in error, is whether *any* action is maintainable against the sheriff for arresting a person, who, at the time of such arrest, is privileged by reason of his attendance to give evidence before a court of competent jurisdiction.

The plaintiff has declared in case: and, in the first count of his declaration, alleges that, whilst he was returning to his place of abode from the Registry office of the Court of Review in bankruptcy, to which he had been summoned by an order of the said court for the purpose of being examined under a fiat, the defendants, well knowing that he was privileged from arrest, wrongfully and maliciously arrested him under a writ of *capias ad satisfaciendum*, directed to the two first mentioned defendants, as the sheriff of Middlesex. And, if an arrest under such circumstances affords no ground of action at law for damages, but is only the subject of an application to the court under whose authority the party had been compelled to appear as a witness, the plaintiff below will be out of court as to the first count or breach in his declaration. And we are of opinion that the arrest by the sheriff, under a writ from any of the queen's courts, of a person privileged from arrest by reason of attendance as a witness under the process of another court, does not form the ground of any action at law.

\*That an action of trespass and false imprisonment is not main-  
 \*393] tainable has been long settled by the two cases of *Cameron v. Lightfoot*, 2 W. Bl. 1190, and *Tarlton v. Fisher*, 2 Doug. 671. And, had it not been for the question made by Lord MANSFIELD, in the latter case, at the end of the opinion given by him, we should have thought the question equally settled as to an action on the case; for the reasons upon which the judgment of the court proceeds, as well in the one case as the other, appear to apply to both forms of action. That broad ground is, that the privilege, the breach of which is the subject of complaint, is not to be considered, as it was accurately laid down by Lord Chief Justice DE GREY in the case of *Cameron v. Lightfoot*, 2 W. Bl. 1190, to be the privilege of the person attending the court, but of the court which he attends; and therefore the allowing or not allowing the privilege is discre-

tionary; and it has been disallowed in collusive actions, and in vexatious ones, as in the *Anonymous Case* in 11 Mod. 79, or where the party attends as a volunteer, and not upon process.

The extreme difficulty, cast on the sheriff, of determining whether the privilege set up by the party is founded in truth is another ground for holding the action not to lie. He cannot, as was observed by the court in *Tarlton v. Fisher*, 2 Doug. 671, administer an oath; and he must refuse to execute the process of the court at his peril. And it may be added that, though the sheriff may know the party has the privilege, it is impossible for him to be certain that the party means to claim it; and unless he does claim it he is in lawful custody, and the judgment satisfied. For these and other reasons stated \*by the court in their judgment given in each of the cases above referred to it, was decided, without [\*394 any doubt, that, under such circumstances, no action of trespass lay against the sheriff, and that the only mode of redress was, in ancient times, by suing out the writ of privilege, and, in modern times, by summary motion to discharge the prisoner.

And we think these reasons extend equally to an action on the case. The ground on which case is contended to be maintainable is, that the allegation, on the declaration, of knowledge on the part of the sheriff shows that the arrest was malicious, and that a malicious arrest is the proper subject of an action on the case. But the older authorities prove that no such distinction exists. In *Vandevelde v. Lluellin*, 1 Keb. 220, the case is, "if witness, coming to testify in a cause in Middlesex, be arrested in London by one knowing the cause, he hath no remedy but by habeas corpus to examine and deliver him thereby; but if there be any contempt by the officer, &c., an attachment may afterward be awarded against him." And in no book, as observed by the court in *Cameron v. Lightfoot*, 2 W. Bl. 1190, "is there any intimation of an action being maintainable for such an arrest, but the question has always been merely the delivery of the party; the process still continuing legal, and capable of being executed at a subsequent time, when privilege does not intervene." And this application to the court appears therefore to provide both for the case where the sheriff innocently and in ignorance of the privilege arrests the witness, and where he maliciously and with knowledge of the privilege makes the arrest; in the one case the court simply discharging from \*the custody of the sheriff, in the other punishing for a contempt; but [\*395 in both cases considering the privilege as that of the court, and not as the privilege of the party.

We therefore think the first count discloses no ground of action.

As to the second count or breach, which is also framed in case, being upon a non-feasance, or omission of duty, in not discharging the plaintiff, we think the cause of action stated in that count, if the ground of any action (which may be very questionable,) is the ground of an action of trespass and false imprisonment, and not of an action on the case.

That count states that, after the Court of Review had ordered his discharge, and such order was made known to the sheriff, they still kept and detained him in custody. Admitting that the Court of Review had the power so to do, the further detention of the plaintiff, without the authority of any writ to justify it, became a new trespass and false imprisonment, in the same manner as if there had been a new caption. And, if the plaintiff had declared in trespass, and the sheriff justified under the writ, the plaintiff might have now assigned this illegal detainer as the trespass and imprisonment of which he complained.

On the ground, therefore, that the plaintiff has no cause of action upon the first count, and no ground for an action on the case in the second, we think the judgment of the court below should be reversed.

Judgment reversed.

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\*GIBBS v. WHATLEY.

The scale of taxation in the Directions to taxing officers, Hil. Vac. 4 W. 4, for causes where the sum recovered does not exceed 20*l.*, applies, with respect to all the items not expressly distinguished, to country causes as well as to town causes.

J. GRAY, in last Easter term, obtained a rule calling upon the plaintiff to show cause why the master should not review his taxation in this case.

The action was for work and labour. On the trial, before ERSKINE, J., at the Gloucestershire Spring assizes, 1843, the plaintiff obtained a verdict for less than 20*l.* The learned judge refused to certify that the cause was proper to be tried before him. The costs were taxed upon the lower scale, except as to two items, namely, 14*l.* 14*s.*, with a mileage, for attendance by the plaintiff's attorney at the assizes for seven days, and 3*l.* for the attendance of two witnesses, seven days each; which allowances the defendant contended were not consistent with the Directions to taxing officers, Hil. Vac. 4 W. 4, 5 B. & Ad. xix. In last Trinity term, (a)

*Humfrey* showed cause. It has been understood by the officers that the scale, as to such items as those now in question, applies to town causes only, and that in country causes they have a discretion in this respect. And this seems reasonable: for, if the scale is to be applied universally, the attorney will receive only a guinea for his attendance at the assizes, and no mileage, whatever the length of the assizes, and whatever

\*397] \*distance he has to go. (b) This cannot have been intended.

*J. Gray*, contra. The other items in the scale apply to country

(a) June 15th, 1843. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) See now the new Directions to the taxing officers in actions where the sum recovered does not exceed 20*l.*, Trin. T. 7 Vict.; post; and 13 M. & W. 1. The following is now the allowance in respect of the items above mentioned.

"If the attorney attending a writ of trial has to go a distance, mileage one shilling one way.

causes as well as town causes: and there is no appearance of its having been intended to limit the application. The certificate of a "judge of assize" is spoken of, which can apply only to country causes. It is important that attorneys should not be induced to take trifling causes to the assizes. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

It seems that the masters have treated the scale given in the Directions to taxing officers, Hil. Vac. 4 W. 4, as applicable to town causes only. After a consultation with the other judges, we are of opinion that there is no power to make such a distinction. The taxation, therefore, in this case is wrong: and the rule must be made absolute. *Rule absolute.*

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**\*HAYWARD v. HEFFER and HALES the Younger. [\*398**

Where a party, under stat. 1 & 2 Vict. c. 110, s. 8, had made affidavit of debt against H. in the Bankruptcy Court, and H. had entered into a bond, with sureties, conditioned to pay such sum as should be recovered against him in an action on the debt, or to render himself, this court held that it had no power on application by the sureties, suggesting that H. had rendered, to order the bond to be delivered up to be cancelled.

M. CHAMBERS, in last Hilary term, obtained a rule calling on the plaintiff to show cause why the bond entered into by the defendant, Henry Hales, junior, and his sureties, with the plaintiff, should not be delivered up to be cancelled, Hales having surrendered himself to the custody of the sheriffs of London in execution, upon a writ of ca. sa. issued by plaintiff upon the final judgment signed in this cause, and subsequently been removed by his sureties by habeas corpus and committed to the custody of the marshal of the queen's prison, in order to comply with the condition of such bond; or why the sureties of Hales should not have leave to render him to the custody of the said marshal pursuant to the condition; and why the said sureties should not have ten days' time for that purpose.

The rule was obtained on affidavits disclosing the following facts. In January, 1841, the plaintiff filed in the Court of Bankruptcy an affidavit of a debt of 681*l.* 15*s.* 1*d.*, due to him on a promissory note of the defendants, and served a copy on defendant Hales, with a notice demanding payment by the time therein stated. In February, 1841, Hales, together with T. H. Bennett and T. Cope, gave a bond (a) to plaintiff in the penal sum of 1363*l.* 10*s.* 3*d.*, conditioned to be void on payment by Hales to plaintiff, his executors, &c., of \*such sum as should be recovered against Hales and Heffer, or against Hales, in any action which might have been, or should be, brought for the recovery of the debt, with

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"Attorney attending trial at a distance one guinea per day as long as necessarily detained in going to, attending, and returning from, the trial, if no other business; or, if other business, in the whole not to exceed two guineas a day."

(a) Under stat. 1 & 2 Vict. c. 110, s. 8. See the alteration in the condition under stat. 5 & 6 Vict. c. 122, s. 13.

costs; or if Hales “shall render himself to the custody of the jailer of the court in which such action shall have been or may be brought for recovery of the said alleged debt, according to the practice of such court, or within such time and in such manner as the court, or any judge thereof, shall direct, after judgment shall have been recovered in such action.” The present action was afterwards brought in this court; and the cause was tried at the London sittings after Trinity term, 1841, when the plaintiff obtained a verdict. In Michaelmas term, 1841, a rule nisi for a new trial was obtained, which was discharged in Trinity term, 1842; final judgment was signed on 30th June, 1842; and a ca. sa. was issued, on 29th October, 1842, for 924*l.*, damages and costs, with interest, &c. The ca. sa. was returnable on 15th November, 1842. Hales surrendered himself into the custody of the sheriffs on 14th November, 1842, and was confined in Whitecross Street prison. Afterwards, on behalf of Bennett and Cope, the sureties to the bond, a habeas corpus cum causâ was issued, upon which Hales was committed to the custody of the marshal. On 15th November, 1842, notice was served on the plaintiff that Hales had surrendered himself to the custody of the sheriffs “in discharge of his bail or sureties upon the writ of ca. sa.,” and had been removed by habeas corpus to the custody of the marshal. The sheriffs were ruled to return the ca. sa., which they did on 21st November, 1842, stating the caption, the habeas corpus and the commitment to the custody of the marshal. Hales, while in the custody of the marshal, petitioned the \*Insolvent Debtors’ Court, filed his schedule, and was admitted to bail by that court till the hearing of his petition, which was to be on 23d January, 1843. On 12th December, 1842, a summons was taken out, on behalf of the sureties, to have the bond delivered up to be cancelled; on the hearing of which, 14th December, 1842, COLERIDGE, J., ordered proceedings to be stayed till the 5th day of Hilary term, 1843.

The present rule was obtained on the first day of that term.

From the affidavits in answer it appeared that the ca. sa. had been endorsed “to be returned non est,” and had been lodged for the purpose of fixing the bail in the action: that the plaintiff had received from the sheriffs a demand of poundage: and that he had opposed the admitting of Hales to bail in the Insolvent Debtors’ Court. On 11th February, 1843, Hales again surrendered to the custody of the marshal; and, on 18th February, 1843, he was discharged by the Insolvent Debtors’ Court. In last Trinity term,<sup>(a)</sup>

*Butt* showed cause. This is not such a render as to satisfy the condition of the bond within the intent of stat. 1 & 2 Vict. c. 110, s. 8. The defendant has made the plaintiff liable to poundage.<sup>(b)</sup> And, if it be such a render, it is unnecessary to set the bond aside, because the render then

(a) June 15th, 1843. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) See *Magnay v. Monger*, 4 Q. B. 817.

will be an answer to any action brought on the bond. But the court has no jurisdiction to cancel the bond. In *Wilson v. Firth*, 9 Dowl. P. C. 573, \*COLERIDGE, J., did indeed order the cancellation of a bond given under this section, where it clearly had been satisfied, [\*401 though it seems that ALDERSON, B., had doubted as to the power. But in *Ridler v. Chappelow*, 1 Dowl. P. C. N. S. 637, the full Court of Exchequer decided that there was no such power. This is not like the case of a bond made in the course of a cause, as a matter of practice of the particular court. The giving the bond here is an independent proceeding under the express directions of the statute.

Sir *F. Pollock*, attorney-general, and *M. Chambers*, contra. The sureties here were entitled to discharge themselves by rendering Hales; *Owston v. Coates*, 10 A. & E. 193.(a) The render is good, being before the return of the ca. sa.; *Anonymous Case* in 6 Modern Reports, 238, 239. [PATTESON, J. But what power have we over the bond itself? Lord DENMAN, C. J. Why are we to deal with this bond otherwise than with any other bond alleged to be satisfied?] The court will order a bail bond to be cancelled: this is like the case of bail to the action. [PATTESON, J. There the recognisance is the creature of the court: here the giving of the security is directed by a statute.] *Cur. adv. vult.*

Lord DENMAN, C. J., now said that the court, upon consideration, were of opinion that they had no authority to make the order.

Rule discharged.

(a) See *Geikie v. Hewson*, 4 M. & G. 618.

### \*The QUEEN v. The Mayor, Aldermen, and Burgesses of the [\*402 Borough of MANCHESTER.

An attorney cannot, under stat. 5 & 6 W. 4, c. 76, s. 66, or stat. 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emoluments which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney.

SIR F. POLLOCK, attorney-general, in last Trinity term, obtained a rule nisi for a mandamus calling upon the above named defendants to assess compensation out of the borough fund to Oswald Milne, gentleman, "for the loss of the salaries, fees, profits and emoluments of the several offices of clerk to the magistrates for the county of Lancaster, acting for the division of Manchester, and of clerk to the justices appointed under an act," &c., (53 G. 3, c. 72,) "and whose respective sittings were held in the New Bailey courthouse in Salford; and of, for and in respect of the prosecuting of offenders for offences committed within, and other proceedings and business arising from, or connected with, the said division; and of clerk to the commissioners for cleansing, lighting, watching and regulat-

ing the town of Manchester, appointed under the several acts of parliament made and passed in reference thereto."

The rule was granted on an affidavit of Mr. Milne, stating, among other things, that his father was clerk to the magistrates for the county acting for the division of Manchester, which included the townships of Manchester and Salford and several other townships, and whose sittings were held at the New Bailey courthouse. That, on his father's retirement, in 1812, deponent entered on the said office of clerk to the magistrates in his place and stead, at the unanimous request of \*all the magistrates then acting for the division. "That such appointment was a general one, without any period of termination being mentioned; and that from thence hitherto, except as hereinafter mentioned, this deponent held the said office. That, in 1813, the amount of criminal business in the said division of Manchester being greatly on the increase, the appointment of a stipendiary magistrate to act for the said division took place, under and by virtue of a certain act," &c., (53 G. 3, c. 72,) "who was required by the said act to sit daily, Sundays excepted, for the transaction of magisterial business at the New Bailey courthouse in Salford aforesaid. That he this deponent, on such appointment taking place, was also appointed and acted as clerk to the said stipendiary magistrate. That, from the respective times he this deponent commenced acting as clerk to the magistrates for the said division of Manchester and clerk to the stipendiary magistrate, various changes have from time to time taken place in the justices acting in the commission of the peace for the said division and under the said act respectively; and that on all such changes taking place the said justices for the time being have concurred in appointing and continuing this deponent as their clerk." That a charter of incorporation was granted to the borough of Manchester in 1838; and that in 1839 the new borough obtained grants of a separate commission of the peace, and a separate Court of Quarter Sessions. "That a great portion of the said division of Manchester is included in the district forming the said municipal borough; and that the greater portion of the business of the magistrates acting for the said division of Manchester, and of the said stipendiary magistrate, arose in \*and for the said district so incorporated; and

\*403] that the greatest portion of the profits, fees and emoluments of this deponent as clerk as aforesaid arose from and in respect of the said district and the criminal business thence arising; and that the profits, fees and emoluments of and incident to the said office of clerk so held by deponent as aforesaid were, before the granting of the said charter of incorporation, very large." That the new commission of the peace was opened in June, 1839, when the justices of the municipal borough appointed another person to the office of clerk to the justices of the said borough, who had acted ever since; and deponent was, in consequence, "deprived of the profits, fees and emoluments arising from or

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in respect of the said district so incorporated, and the criminal business thence arising."

The affidavit further stated: "That from the time of this deponent being appointed clerk to the magistrates as aforesaid until the grant of the said charter of incorporation" "he, this deponent, was employed by the said stipendiary and other magistrates as solicitor in the prosecution of offenders committed by them to prison for trial at, and tried at, the quarter sessions for the county of Lancaster held by adjournment at the New Bailey courthouse in Salford in the said county, as well as in the prosecution of offenders committed by them to prison for trial at, and tried at, the assizes for the said county. That the said employment was held by this deponent together with, and was incident to or connected with, the said appointment or office of clerk to the stipendiary and other magistrates so held by this deponent as aforesaid, in manner following (that is to say:) he this deponent had to get up and prepare for \*trial on the part of the prosecution the cases against prisoners committed and tried as aforesaid, where the party bound over to prosecute did not think fit to employ a solicitor of his own and gave no notice to the contrary, this deponent receiving his remuneration for the said duties by orders on the treasurer of the said county." And that, since the granting of a charter (May, 1839,) the town council of Manchester had appointed another person "to be solicitor in all prosecutions of offenders committed by the justices of the peace for the said borough under the said borough commission, either for trial at the quarter sessions for the said county held by adjournment at the said New Bailey courthouse, or at the assizes for the said county:" whereby deponent lost all the profits, fees and emoluments "accruing to him from being employed as solicitor in all cases of prosecution arising out of the various townships and places within the incorporated borough," which before, &c., accrued to him, &c. [\*405]

The affidavit further stated that Mr. Milne delivered to the town council a claim of compensation under stats. 5 & 6 W. 4, c. 76, s. 66, and 5 & 6 Vict. c. 111, (a) s. 2, "for fees, emoluments and profits received" by him as "clerk to the justices of peace appointed under an act," (53 G. 3, c. 72,) "and also as clerk to the magistrates for the county of Lancaster acting for the division of Manchester, and whose sittings were held in the New Bailey," &c., "for and in respect of the prosecuting of offenders for offences committed within, or other proceedings or business whatsoever coming, arising, derived from or connected with, the several townships \*comprised within the limits of the said incorporated borough of Manchester, for five years before the 21st day of June, 1839, when the first sitting of the justices appointed under the grant of the said borough commission took place." He also stated other heads of claim, [\*406]

(a) "To confirm the incorporation of certain boroughs, and to indemnify such persons as have sustained loss thereby."

referred to in the rule nisi above mentioned. The council refused to grant any compensation.

The affidavit of the town clerk, in answer, denied that Mr. Milne, when engaged to conduct prosecutions as stated in his affidavit was employed by the magistrates, or that they had power so to employ him, and referred to stat. 5 & 6 W. 4, c. 76, s. 102, as discountenancing the practice of allowing the clerk of the justices to prosecute offenders committed by them.

Sir *T. Wilde*, Serjt., and *Kelly*, in last Trinity vacation, (a) showed cause, and contended that Mr. Milne was not, as clerk to the justices, an officer within stat. 5 & 6 W. 4, c. 76, s. 66, or stat. 5 & 6 Vict. c. 111, s. 2; but they insisted further that, if he were such officer, he could not allege, as a valuable right, an advantage in the conducting of prosecutions which made it his interest that they should be multiplied; and that the practice of employing the justices' clerk as prosecuting attorney was incorrect, and no claim could be founded upon it. (No decision having taken place, except on this point, the rest of the argument is omitted.)

The court said they would consider whether it would be necessary to hear counsel (Sir *F. Pollock* attorney-general, Sir *W. W. Follett*, solicitor-general, *Starkie*, *Cowling*, and *Cardwell*) in support of the rule. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court. (b) The only part which it is material to state here was as follows.

With respect to the value of Mr. Milne's office as clerk to the magistrates, the court is most clearly of opinion that he has no claim to compensation for the loss of professional gains, such as were formerly received by him in respect of the prosecution of offenders by desire of the magistrates. That is not a species of patronage which belongs to them, and is no ground for compensation.

The court ordered that a mandamus should issue, on return to which the other points of the case might be discussed if it were thought proper.

Rule discharged as to the compensation claimed for prosecutions, absolute as to the other claims. (c)

(a) June 14th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js

(b) The judgment is ex relatione Cardwell.

(c) A return was made, and traversed; the parties went to trial at the Liverpool Summer assizes, 1844; and a verdict was found for the crown. A rule nisi was obtained for a new trial, or for entering a verdict for defendants, in Michaelmas term, 1844, and is still depending.

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•GARBETT v. VEALE and LOWE.

A *fi. fa.* was issued against one of two partners; and while the sheriff was in possession, a fiat in bankruptcy issued against the firm. The sheriff, under an arrangement (the validity of which was afterwards questioned,) allowed the messenger under the commission to take possession of the goods; the messenger kept possession as

cordingly, and the goods were sold by the assignees, who received the proceeds. The execution creditor sued them for money had and received.

*Held* that, even if the sheriff had sold the interest of the partner against whom execution issued, an account of the partnership liabilities must have been taken before such representative could have sued for money had and received. And that the execution creditor in this case had no right of action.

ASSUMPSIT for money had and received, and on an account stated. Plea, non-assumpsit. Issue thereon. The particulars of demand stated that the action was brought "to recover the sum of 247*l.*, being one half of the proceeds received by the defendants from the sale made by them of the joint estate and effects of Thomas Reeves and William Reeves, in or about the month of June, 1841."

On the trial, before TINDAL, C. J., at the Worcestershire Summer assizes, 1842, it appeared that Thomas Reeves and William his son, were coach-builders in partnership. William Reeves became separately indebted to the plaintiff, who brought an action and obtained judgment for the amount, and, on 19th April, 1841, sued out a *fi. fa.*, directed to the sheriff of Worcestershire, to levy 317*l.* 2*s.* of the goods of W. Reeves. On 29th April, the writ was delivered to the sheriff, who, on the same day, seized goods of William Reeves, and also partnership effects of Thomas and William Reeves: and he advertised the share of William in the partnership effects to be sold on the 10th of May next ensuing. On April 30th a joint fiat issued against T. and W. Reeves, founded on an act of bankruptcy prior to the seizure. On the following day Corbett, solicitor to the petitioning creditor, demanded of the sheriff the goods advertised for sale, as being property of the partnership, giving \*him notice at the same time that T. and W. Reeves had committed an act of bankruptcy, and that a fiat had issued against them. It did not appear that the plaintiff had had any previous notice of the act of bankruptcy. A warrant to seize the goods of T. and W. Reeves was delivered to a messenger under the commission; and the sheriff's officer, after being a few days in possession, withdrew, (May 19th,) leaving the partnership goods in the messenger's hands. The defendant Veale became provisional assignee on May 5th; and Lowe was appointed assignee on May 21st. The plaintiff gave evidence of conversations held severally by Corbett and Veale with parties acting for the execution creditor, to show that the goods were left with the messenger by an arrangement between the parties that he should hold them on behalf of both until a sale should take place, when the proceeds should be received by the assignees without prejudice to such right as the plaintiff might have. It was urged, for the defendants, that the conversation with Corbett appeared, by the evidence, to have taken place before Veale was appointed assignee, and therefore did not bind him; and that Lowe, at all events, was not bound, it appearing that both conversations passed before his appointment. The assignees sold the partnership goods in June, 1841, and held the proceeds, amount

ing to 498*l.* 15*s.* William Reeves deposed at the trial that his father owed the firm 3000*l.* at the time of the bankruptcy. For the defendants it was contended that the separate creditor was, at most, entitled to only a moiety of the joint estate, subject to the liabilities of the firm, and these, in the present case, exceeded the assets. TINDAL, C. J., thought that, when the sheriff had actually seized, he was in possession of a moiety  
 \*410] for \*the execution creditor, and that the other creditors had no remedy but in equity: and he directed a verdict for the plaintiff, giving leave, however, to move to enter a nonsuit. *R. V. Richards*, in Michaelmas term, obtained a rule nisi accordingly. In last Trinity vacation,<sup>(a)</sup>

*Talfourd*, Serjt., and *W. J. Alexander* showed cause. No answer was given to the plaintiff's case. He had obtained judgment in an adverse suit; and the sheriff had actually seized, no notice having at that time been received of an act of bankruptcy. The plaintiff's right could not be affected by the subsequent bankruptcy, or by the solvency or insolvency of the joint estate. *Taylor v. Fields*, 4 Ves. 396, 15 Ves. 559, note (90) to *Young v. Keighly*, and *Dutton v. Morrison*, 17 Ves. 193, were cited at the trial; but those cases relate only to the situation of parties in a court of equity. In *Burton v. Green*, 3 Car. & P. 306, cited in moving for the rule, Lord TENTERDEN merely expressed a doubt "as to the interest which the sheriff might have sold under the execution." Whatever may be the rule in equity, the right at law of the creditor, in a common case of execution against partnership property, is clear. In *Eddie v. Davidson*, 2 Doug. 650, a case exactly like this, the right of a creditor, who had taken partnership effects in execution, to retain so much as the partner's share amounted to, was recognised by the court: and in *Parker v. Pistor*, 3 B. & P. 288, and *Chapman v. Koops*, 3 B. & P. 289, (where *Eddie v. Davidson*, 2 Doug. 650, was referred to,) it was held clear that the sheriff's duty was to sell the partnership effects, leaving the partners to enforce  
 \*411] \*their right over those effects by proceeding in equity. Lord ALVANLEY said, in *Chapman v. Koops*, 3 B. & P. 289: "By the law of England the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But if the other partners wish to take advantage of this circumstance they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up to sale." The language of Lord ELDON in *Dutton v. Morrison*, 17 Ves. 193, 205—210, is consistent with this, and with the legal right claimed here by the plaintiff. And

(a) June 29th. Before Lord Denman, C. J., Patteson, and Williams, Js.

so, in *Burnell v. Hunt*,<sup>(a)</sup> where a question arose as to the seizure of \*goods, alleged to be partnership property, under an execution against one of the supposed partners, PATTESON, J., said: "The proper course is, for the sheriff to seize the whole, and to sell the share of the execution partner; and the vendee will have to settle the matter in chancery." [\*412]

*R. V. Richards*, contra. The execution creditor could take no greater interest than the debtor had; that is, only the liberty to become tenant in common with the other partner, subject to all the joint liabilities. The supposed arrangement, if binding, could not operate as an agreement that part of the proceeds of sale should be received to the plaintiff's use. *Burton v. Green*, 3 Car. & P. 306, shows at least that Lord TENTERDEN thought it difficult to say how the sheriff could dispose of the interest of a partner against whom execution had issued. In *Holems v. Mentze*, 4 A. & E. 127, on an interpleader rule obtained by the sheriff, it appeared that he had taken goods in execution, but was required to quit possession by a person who alleged that he and the defendant were partners, and the goods partnership property, that the defendant was greatly indebted on the balance of partnership accounts, and that he had, in fact, no beneficial interest in the property. This court held that, the goods being claimed as partnership property, the sheriff's \*duty was clear. Lord DENMAN, C. J., said: "He is to sell for such interest as the defendant has as partner; not for the degree of right which he may be found to have, on a winding up of the affairs, because, if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time. Under the law as it formerly stood, and it is the same now, the sheriff, in a case of partnership, must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in [\*413]

(a) In Q. B., Hil. T. 1841, 5 Jurist, 650, 651. The case referred to appears to be *Hunt v. Burnell*, Esq., a special case argued on Tuesday, January 19th, 1841, by Whitehurst for the plaintiff and Gale for the defendant, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js. It was an action on the case against the sheriff of Derbyshire, who was charged, in the first count, with having seized and sold goods belonging to plaintiff and one Unsworth jointly, under a fi. fa. against Unsworth alone, instead of selling only Unsworth's share; and, in the second, with trover and conversion of plaintiff's goods. Pleas: (1) to the whole, not guilty; (2) to the first count, that the goods were not the joint property of the two; (3) to the third count, that they were such joint property, justifying under the fi. fa. and an alleged sale of Unsworth's interest only. Issues were joined on the first and second pleas, and also on a traverse by plaintiff of the joint property alleged in the third plea. A partnership was suggested to have arisen on an agreement, whereby Unsworth, who had otherwise no interest in the goods (they belonging to plaintiff) was to receive weekly wages till profits accrued, and then half the profits. The nature of the sheriff's duty, upon a fi. fa. against one of two partners, was fully discussed: but the court pointed out that the case did not raise the question, as no profits were shown to have accrued, and as the agreement postponed the partnership till such accruing: and therefore it was ordered, that judgment should be entered for defendant on so much of the first issue as related to the first count; and for plaintiff, as to so much as related to the second count; and that judgment should be entered for defendant on the second issue, and for plaintiff on the third.

common with the other partners; and the purchaser must do the best he can to ascertain what interest there is." The sheriff, therefore, may sell; but the creditor cannot recover the proceeds to the exclusion of the other creditors: that is the rule in equity, as laid down in *Taylor v. Fields*, 4 Ves. 396, and recognised in *Ex parte Hamper*, 17 Ves. 403; and it must prevail equally in the action for money had and received, which is an equitable action. Supposing that, in this case, the interest of William Reeves had been sold; the purchaser would have known that he took it subject to the partnership liabilities, and would have offered less on that account. In *Parker v. Pistor*, 3 B. & P. 288, the case, at law, was considered as clear. According to the view there taken by the court, the interest of the defendant partner should be sold; that is, the interest subject to the partnership claims: the purchaser would become tenant in common of the goods; but he could not claim the proceeds except through the medium of an account which would let in all questions between the partners. Clearly he could not maintain an action at law for them. [PARTESON, J. Here the assignees did not \*sell the interest of William Reeves, but the goods themselves.] That is so: and the plaintiff seeks to recover the undivided net proceeds. *Cur. adv. vult.*

LORD DENMAN, C. J., in this vacation, (December 6th,) delivered the judgment of the court. After stating the material facts, his lordship proceeded as follows.

According to the evidence of the son, Thomas Reeves the father was indebted to the partnership in a considerable sum of money; but still the son's interest could be only in the surplus which might remain after payment of the partnership debts; and that surplus must depend upon a settlement of accounts which the court cannot take without consent of the parties interested. If the sheriff had sold William Reeves's interest, the vendee could have been only tenant in common of the proceeds with the assignees of the firm, and could not have maintained an action without a settlement of account; still less can this action be maintained by the execution creditor. *Rule absolute.*

\*415]

\*CLAYTON v. CORBY.(a)

In trespass for breaking plaintiff's close and digging and carrying away clay, defendant justified as owner of a brick-kiln, and pleaded that all occupiers thereof, for thirty years, had enjoyed, as of right, &c., a right to dig, take and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick-kiln, in every year, and at all times of the year.

*Held*, unreasonable, and bad.

TRESPASS. The declaration charged that defendant, to wit on, &c., and on divers other, &c., with force and arms, &c., broke and entered a close of plaintiff, situate, &c., and then dug up, turned up, loosened and

(a) See *Clayton v. Corby*, 2 Q. B. 813 827, note (a).

removed the clay, sand, gravel, earth, soil and turf, of and belonging to the said close, and then seized, took and carried away divers large quantities of the same respectively, to wit 4000 cart loads of clay, &c., (specifying quantities of sand, gravel, earth, soil and turf,) of plaintiff, being of great value, to wit, &c., and then converted, &c.; and other wrongs, &c.

Pleas. 1. Justification under a prescription. Replication traversing the prescription. Issue thereon.

2. That, before and at the said several times when, &c., defendant had been and was the occupier of a certain tenement and premises, to wit a brick-kiln, with the appurtenances, situate and being in the parish and county aforesaid; and that defendant, whilst he was such occupier aforesaid, and all the occupiers for the time being of the said last mentioned tenement, with the appurtenances, for the full period of thirty years next before the commencement of this suit, have respectively had and enjoyed, as of right and without interruption, and defendant still, as of right, ought to have and enjoy, a right to dig, take and carry away, in, out of and from the said close in which, &c., so much of the clay of the said close in which, &c., as was at any time required by him and them, his and their \*servants, for the purpose of making bricks in and at the said last mentioned brick-kiln, in every year, and at all times of the year. The defendants then justified the entry to dig clay, and the digging and taking away the clay, and therein unavoidably turning up, &c., and carrying away a little of the gravel, &c. [\*416]

Replication, traversing the prescription. Issue thereon.

On the trial, before WILLIAMS, J., at the Buckinghamshire Summer assizes, 1842, a verdict was found for the plaintiff on the first issue, and for the defendant on the second. In Michaelmas term, 1842, *Byles* obtained a rule to show cause why judgment should not be entered for the plaintiff non obstante veredicto.(a) In the vacation after last Trinity term,(b)

*B. Andrews* showed cause. The prescription set out in the second plea is not, perhaps, so usual as that for turbary or pasture: but it is equally reasonable. In Co. Litt. 122 a, it is said: "There be also divers other commons, as of estovers, of turbary, of piscary, of digging for coals, minerals, and the like." In *Duberley v. Page*, 2 T. R. 391, the defendants in trespass succeeded upon a justification under a right to dig sand or gravel upon the waste. In *Shakespear v. Peppin*, 6 T. R. 741, and *Peppin v. Shakespear*, 6 T. R. 748, a right to dig loam and gravel was pleaded; and the legality of such a right was not questioned.

*O'Malley*, contra. The objection is, not to the legality of a right to dig clay, but to a right claimed, \*as here, without any limitation as to times of the year, or the extent to which the clay may be [\*417]

(a) The rule was also for a new trial, upon points which were either abandoned by the defendant's counsel, or not decided upon by the court.

(b) June 27th, 1843. Before Lord Denman, C. J., Williams, and Coleridge, Js.

carried away. It is like a claim of common without stint, pleaded as annexed to a messuage without land, which is bad; *Benson v. Chester*, 8 T. R. 396.(a) Such claims would exclude the owner of the soil, which would make the prescription or custom be against law; Co. Litt. 122 a. A claim to cut and carry away, to be used for the improvement of grass plots, such turf as was fit and proper to be so used, at all times of the year, as often and in such quantity as occasion required, was held illegal in *Wilson v. Willes*, 7 East, 121. [COLERIDGE, J. In this case the quantity to be taken is limited by the quantity required to make bricks at a particular kiln.] In *Wilson v. Willes*, 7 East 121, the turf was to be so much as was required for particular tenements. In *Wilkes v. Broadbent*, 1 Wils. 63,(b) the tenant of the lord of a manor, who was owner of the coal mines in the manor, justified under a custom to dig the mines and lay the rubbish on the surface in heaps upon the land near the pits, at the will and pleasure of the lord; and the alleged custom was held bad, as being too loose, and destructive of the whole profits of the land. A prescription and a custom, as to this point, must be judged of upon similar principles. In *Shakespear v. Peppin*, 6 T. R. 741, the right was claimed as annexed to tenements being part of the same manor to which the waste belonged; the brick-kiln here is not connected with the land from which the clay is to be taken. In \**Valentine v. Penny*, Noy, 145, (which is cited \*418] in 3 Cruise Dig. 71, 4th ed., tit. xxiii. *Common*, sect. 32) trespass was brought for breaking a close and digging the soil; and the defendant justified that he, and all whose estate he had in a cottage, had common of turbary to dig and sell ad libitum, as belonging to the house; and the plea was held ill, as showing a right of common which was an interest and a freehold, and which, as a prescription, was repugnant, because "a common appertaining to a house, ought to be spent in the house, and not sold abroad." A common of turbary in a mere occupant within a manor is illegal; and, if land ceases to be common, as by act of parliament, the right of a tenant to take turf there ceases; *Dean and Chapter of Ely v. Warren*, 2 Atk. 189. In *Hayward v. Cunningham*, 1 Lev. 231, a plea of prescription, in right of an ancient house, to carry away every year as many turfs as two men could dig in a day, was demurred to, because it was not shown that the turfs were to be burnt in the house. In Siderfin's report of the same case (c) it is said that the court thought the plea bad. In Levinz's Report, 1 Lev. 231, however, though it is said that judgment was given for the plaintiff, it is said also that the court held the prescription good; but the reason given is that the limitation to as much as two men could dig in a day gave sufficient certainty. There a decision was cited, and recognised by the court, "that a prescription for digging clay in another's soil to make pots, is void." The clay is not like any

(a) See note (4) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 28 c., 6th ed.

(b) In K. B., affirming the judgment of C. P., *Broadbent v. Wilks*, Willes, 360.

(c) *Heyward v. Cunningham*, 1 Sid. 354.

produce which can be reproduced. The court cannot assume that so unreasonable a grant could ever have been made. *Cur. adv. vult.*

\*Lord DENMAN, C. J., now delivered the judgment of the court. [\*419]

This was an application, on behalf of the plaintiff, for leave to enter a verdict for him with nominal damages, notwithstanding the finding of the jury for the defendant upon his second plea.

The declaration is in trespass for breaking and entering the close of plaintiff, and digging for and removing clay, sand, &c. The said second plea states, in substance, that, before and at the said times, &c., the defendant was the occupier of a certain tenement and premises, to wit a brick-kiln, and that he, as such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty years before, &c., had and enjoyed, as of right and without interruption, a right to dig, take and carry away, from, &c., so much of the clay of the said close as was *at any time required by him or them* for the purpose of making bricks at his said brick-kiln, in every year and at all times of the year, and justifies the alleged trespass accordingly. The replication takes issue on this plea. And the question is whether this plea can be sustained in point of law. And we are of opinion that, upon general principles and the authorities connected with the subject, it cannot.

It is observable that, in all cases of a claim of right in alieno solo, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint, and to any number; but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved. Again, in the case of common of \*estovers, or a liberty of taking wood, called in the books house bote, plough bote and hay bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but we believe accurately, given by Mr. Justice Blackstone, 2 Comm. 35. "These several species of commons do all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire bote for his fuel; and house bote, plough bote, cart bote, and hedge bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds," that is, for a certain and definite purpose. [\*420]

In some of these instances, the thing taken is more or less immediately renewable: and it would seem strange if in these such precision and certainty are required, but less in others where the claim is larger, extending, as in the present case, to a right to disturb and remove a portion of

the soil itself. Upon reference, however, to the authorities, we find that, in cases not substantially distinguishable from the present, the same rule does, as in reason it ought to do, prevail.

In the case of *Wilson v. Willes*, 7 East, 121, the declaration was trespass for breaking and entering the close of the plaintiff, called Hainpstead Heath, and digging and carrying away turf covered with grass, &c. Plea, that the locus in quo was parcel of a waste in the manor of Hampstead; that there had been, from time immemorial, divers customary tenements by copy of court roll; and it then alleged a custom for tenants of such  
 •421] tenements, "having a garden \*or gardens parcel of the same," to dig turf for the making and repairing grass plots in such gardens, every year, at all times of the year, *in such quantity as occasion hath required*; and justified the taking accordingly. To this plea there was a general demurrer; and judgment was given for the plaintiff. In giving judgment, it was said by Lord ELLENBOROUGH, that "a custom, however ancient, must not be indefinite and uncertain;" that it was "not defined what sort of improvement the custom extends to;" that "every part of the garden may be converted into grass plots;" that there was "nothing to restrain the tenants *from taking the whole of the turbary of the common*;" and it resolved itself "into the mere will and pleasure of the tenant."

In the case of *Peppin v. Shakespear*, 6 T. R. 748, the declaration was trespass for breaking, &c., the plaintiff's close. The plea stated the grant to the defendant Shakespear of a customary tenement of the manor of which the locus in quo was parcel, and a custom for the tenants thereof to have common of pasture, and, also, *a liberty of digging sand, &c., for their necessary repairs*; there was then a justification of the breaking, &c., into the locus in quo, as parcel of the common, for such purpose. The court gave judgment for the plaintiff, on account of defects in the plea: in which judgment it was said that the plea "stated that the defendant entered, &c., for the purpose of digging for and carrying away sand, &c., *for the necessary repairs of the said defendant*."  
 "That no question could be made about any of the pleas" (there having been others, which it is not necessary for us to notice) "but that in which it was stated that the tenement was a messuage. And with respect to  
 •422] that they said that \*it ought to have been expressly alleged *that the house was in want of repair*, that the defendants entered for the purpose of digging for and carrying away sand, &c., for the necessary repairs of that house, and that they used the sand, &c., *for that purpose*."

It is true that these two cases respect the validity of a custom; but the reasons upon which the judgments are respectively founded have a strong bearing upon the degree of certainty and precision with which a claim of right generally, in order to be supported, ought to be described.

It remains now to be considered whether the objection of vagueness

and uncertainty be applicable to the plea in question or not. And we think that it is.

The nature of the tenement (so called,) a brick-kiln, leads to no conclusion, one way or the other, as to the extent of the claim and demand upon the soil of the plaintiff. It may have been, at the time of the trespass, of any dimensions and capacity. It may have been, during the thirty years of alleged enjoyment, continually varying; and consequently the quantity of clay required for the purpose of making bricks thereat may have varied also. There is no limit. No amount of clay (measured by cart loads or otherwise) "required," no number of bricks (estimated by hundreds or thousands) claimed to be made, is given or attempted. What is it, therefore, but an indefinite claim to take *all* the clay "out of and from the said close in which, &c.," or, in other words, to take from the plaintiff, the owner, the whole close?

We are of opinion, therefore, that the plea cannot be sustained, and that there must be judgment for the plaintiff for nominal damages, notwithstanding the finding of the jury for the defendant upon that plea.

Rule absolute.

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\*DOE, on the several demises of MARY HARTRIDGE, of  
 THOMAS ROBINSON and SOPHIA ELIZABETH his Wife, [\*423  
 of HENRY WISE BAKER and ELIZABETH his Wife, of SAMUEL  
 HENRY DICKENSON, of RICHARD LATTEr, of THOMAS  
 WESTBROOK and CATHARINE SARAH his Wife, of JOHN  
 BROWN, of MARGARET COLLIS, of JAMES FOSTER, of  
 THOMAS FOSTER, and of GEORGE ROBINSON FOSTER, v.  
 THOMAS GILBERT.

Lands were settled, in contemplation of marriage, with a remainder for life limited to the intended wife if she survived her husband; and with power to her, if she survived, by indenture under her hand and seal to lease "to any person or persons for any term or number of years not exceeding twenty-one years, in possession, and not in reversion, remainder or expectancy; so as upon every such lease there be reserved and made payable, during the continuance thereof, the most and best improved yearly rent that can be reasonably had or obtained for the same, without taking any sum or sums of money or other thing by way of fine or income for or in respect of such lease or leases; and so as none of the said leases be made dispunishable of waste by any express words to be therein contained; and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved; and so as the lessee or lessees, to whom such lease or leases shall be made, do seal and deliver a counterpart or counterparts thereof."

The marriage took place; the wife survived the husband, married again, and, after the second marriage, leased to her second husband, who executed a counterpart.

*Held*, that such lease by wife to husband was not a good execution of the power.

EJECTMENT for a farmhouse, buildings and lands, in the parish of East Farneigh in Kent. Issue having been joined, the facts were stated in the following special case, under an order of Lord ABINGER, C. B.

In August, 1788, James Foster was married to Catherine Clifford; and, in contemplation of marriage, a settlement was made of the property which is the subject of this action.

By indentures of lease and release, bearing date respectively 22d and 23d August, 1788, the property was conveyed to trustees, to the use of James Foster and his heirs until the marriage; remainder to the use of  
 \*424] James \*Foster and his assigns for life; remainder to the trustees to preserve contingent remainders; and, after the decease of James Foster, to the use of Catherine Clifford, his intended wife, and her assigns, for her life; and, after the death of the survivor, to the use of all and every the children of the body of the said James Foster on the body of the said Catherine Clifford, to be equally divided between them, (if more than one,) share and share alike, as tenants in common, and not as joint tenants; and of the several and respective heirs of the bodies of all and every such children.

In this settlement was contained the following proviso. "Provided always, and it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said James Foster, at any time or times during his life, and, after his decease, to or for the said Catherine Clifford, his intended wife, at any time or times during her life, by indenture under his or her respective hand and seal, to demise or lease the said messuages, or tenements, lands, hereditaments and premises hereby granted and released, or intended so to be, or any of them, or any part thereof, to any person or persons, for any term or number of years not exceeding twenty-one years, in possession, and not in reversion, remainder or expectancy; so as, upon every such lease, there be reserved and made payable, during the continuance thereof, the most and best improved yearly rent that can be reasonably had or obtained for the same, without taking any sum or sums of money or other thing by way of fine or income for or in respect of such lease or leases; and so as  
 \*425] none of the said leases be made \*dispunishable of waste, by any express words to be therein contained; and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved; and so as the lessee or lessees, to whom such lease or leases shall be made, do seal and deliver a counterpart or counterparts thereof; any thing herein contained to the contrary thereof in anywise notwithstanding."

The marriage took place on the 26th of August, 1788. James Foster died in 1811: and his wife died in October, 1841: and there was issue of the marriage, two sons and four daughters.

The lessors of the plaintiff were the children, or the legal representatives of the children, of this marriage: and the plaintiff was entitled to recover in this action, if no valid lease was executed by the widow.

In August, 1812, the widow of James Foster married Thomas Gilbert: and, on the 18th of April, 1835, she executed an instrument which con-

tained a demise of the property sought to be recovered in this action to her husband Thomas Gilbert for fourteen years from 11th October, 1834, (if the lessee should so long live,) at the yearly rent of 64*l.*, payable half yearly, on 6th April and 11th October.(a) A counterpart of this instrument was executed by Thomas Gilbert.

\*The validity of this instrument, as a lease under the power contained in the marriage settlement, is disputed by the lessors of the plaintiff. But it has been agreed that they shall not make any objection to its validity on account of the amount of the rent reserved. [\*426]

If the court should be of opinion that it was not a valid execution of the power contained in the indenture of 23d August, 1788, judgment was to be entered for the plaintiff by confession; if they should be of opinion that it was a valid execution of the said power, judgment was to be entered for the defendant by nolle prosequi.

The case was argued in last Trinity term.(b)

*Thesiger* for the plaintiff. The power was not well exercised. A wife cannot convey to her husband. Nor can the husband execute a counterpart to the wife. The covenants could not be enforced by the wife against the husband; and these covenants are required for the benefit, not merely of the party who is to exercise the power, but of those in remainder. Where, indeed, the power is granted to a party without an interest, it may be exercised in favour of such party. "Where the terms of the power are complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties. It is just the same thing as between the lessor and the successor, where the legal tenant is bound during the term in all requisite covenants and conditions:" 2 Sugden on Powers, 334, ed. 6; where *Wilson v. Sewell*, 1 W. Bl. 617; *Taylor v. Horde*, 1 Bur. 60, 124, and *Earl of Cardigan v. Montague*, 2 Sugden on Powers, App. No. 14, (see 1 Bur. 122,) are referred to. But here the protection which the framer of the power contemplated, when he lodged it in a tenant for life who might be expected to see to the enforcement of the covenants, will be lost. The tenant for life cannot sue her husband for not cultivating, nor re-enter for waste. When the party granting the lease is equally interested with the remainderman in getting the best rent, the remainderman has a protection, which fails when the lessor has, through her husband, a stronger interest in the rent being as low as possible. In the case of the *Queensberry* [\*427]

(a) It was argued that this reservation was not a good execution of the power, because no provision was made for the case of the lessee dying between the rent days; but on this point the court pronounced no opinion. Reference was made to *Doe dem. Wilmot v. Giffard*, (2 Sugd. Pow. 427, 8th ed., cited also in *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 371;) *Doe dem. Harries v. Morse* (2 C. & M. 247; S. C., 4 Tyrwh. 185;) *Rutland v. Doe dem. Wythe* (5 M. & W. 688, 696, in Exch. Ch., reversing the judgment of the Court of Exchequer, *Doe dem. Wythe v. Rutland*, 2 M. & W. 661;) *Doe dem. Douglas v. Lock*, (2 A. & E. 705, 736—741.)

(b) June 2d, 1843. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

*Leases*(a) Lord ELDON said that the leading criterion was always whether reasonable care and diligence had been exerted to get the best rent. There is virtually no reservation of the rent here during the life of the lessor. Now the rent was to be reserved "during the continuance" of the lease; and the lessor could not dispense with this even for her own life; *Elmer's Case*, 5 Rep. 2 a; *Lord Mountjoy's Case*, 5 Rep. 3 b, 6 a.

*Platt*, contra. The intention of the party conferring the power must govern its construction; *Goodtitle, lessee of Clarges, v. Funucan*, 2 Doug. 565, 573; *Pomery v. Partington*, 3 T. R. 665, 675, Shepp. Touch. 269, and Preston's note (11) there. Now the restrictions in this power were imposed, not for the benefit of the party exercising it, but to prevent such an exercise as might injure those in remainder and reversion. The objections made \*428] tend only to show some supposed injury to the lessor who exercises the power. It is said that she cannot enforce the covenants against her husband. But, if the lease had been made to a stranger, the lessor might have abstained from enforcing the remedy: the remainderman has no means of compelling her to act; and the remedy of the remainderman himself is not affected. The tenant for life is not bound to accept the rent. "If a power be to a woman to make leases, and she takes husband, a lease by the husband and wife, is well executed;" Com. Dig., *Poiar*, (C 1,) citing *Duke of Buckingham v. Lord Antrim*, 1 Sid 101.(b) "A feme may be an attorney to deliver seisin to her husband;" Co. Lit. 52 a. In Bro. Abr., *Executors*, pl. 175, it is laid down that an executrix may sell to her husband; for which the Year Book, Pasch. 10 H. 7, fol. 20 A. pl. 9, is cited. The lease is properly the act of the party creating the power; the lessee takes from him; and many acts are good between husband and wife, acting merely as instruments, which would be invalid in other cases. "If a charter of feoffment be made to the wife, the husband as attorney to the feoffor may make livery to the wife; and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor;" Co. Lit. 187 b. "If cestui que use had devised, that his wife should sell his land, and made her executrix and died, and she took another husband, she might sell the land to her husband, for she did it *in auter droit*, and her husband should be in \*429] by the devisor;" Co. Lit. 112 a. Many applications of the same principle are to be found in 2 Sugd. Pow. 25, and the subsequent pages; and at p. 27 is the following passage. "This doctrine, that the appointee takes under the original deed, is followed in all its consequences. Therefore, although a husband cannot at common law convey directly to his wife, yet he may make an immediate appointment to her; because her estate arises out of the original seisin; and for the same reason a wife may appoint immediately to her husband; the principle is something

(a) *Montgomery v. Duke of Buccleuch*, 5 Dow. 293, 344.

(b) See 16 Vin. Abr. 481, tit. *Powers* (A. 15,) pl. 3, 1 Ca. Chan. 17, 3 Salk. 276.

similar to that which prevails in copyholds, where a surrender by the husband to the wife, or by the wife to her husband, is good." And reference is made to *Bunting v. Lepingwell*, 4 Rep. 29 a. In 1 Sug. Pow. 184 it is said: "Every person who by the laws of England is capable of disposing of an estate actually vested in himself, may exercise a power over land, or, in other words, direct a conveyance of that land. By the common law a married woman could not dispose of her own estate without a fine or recovery, for which the statute law has now supplied a deed with certain formalities; but, simply, as the instrument, or attorney of another, she could convey an estate in the same manner as her principal, because the conveyance was considered as the deed of the principal, and not of the attorney, and her interest was not affected."

*Thesiger* in reply. The intention, upon which reliance is placed for the defendant, could not have been that the power of re-entry should be totally inoperative during the life of the tenant for life. It is doubtful, \*where the power is coupled with an interest, whether a feme covert can execute without her husband: the subject is discussed in 1 Sugd. Pow. 194, &c., 6th ed., and in 1 Chance on Powers, 202, &c. [PATTERSON, J. The consequences you contemplate would equally have followed if the widow had appointed before her second marriage, and then had married the appointee.] The question is whether the execution of the power was valid at the time of execution. *Cur. adv. vult.* [\*430]

LORD DENMAN, C. J., now delivered the judgment of the court.

The question was on the validity of a lease granted by a tenant for life under a marriage settlement, to which the only objection was that it was granted by a wife to her husband; by the widow of the settlor to the person whom she married after the death of her former husband, the settlor.

The power of leasing was for her, by indenture under her hand and seal, to demise or lease the premises to any person or persons for twenty-one years, so as upon every such lease there be reserved the best rent, and so as none of the said leases be made dispunishable of waste by any express words to be therein contained and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent, and so as the lessee do seal and deliver a counterpart thereof.

The lessor of the plaintiff, the remainderman under the marriage settlement, argued that this lease is void because husband and wife, being one person in law, \*can make no grant to each other. It was also urged that the restrictions on the power of leasing contained in the marriage settlement could not be enforced where the wife demised to the husband; for she can neither re-enter and eject him on non-payment of the rent, or breach of any other covenant, nor make him answerable for waste, nor take from him any binding counterpart of the lease. [\*431]

There is no case in point. For the defendant we are referred to Co. Lit. 52 a, 112 a, 187 b, and Bro. Abr., tit. *Executors*, pl. 175. One an-

swer applies to all those passages that appear favourable to him : the wife was acting in *auter droit* in all the cases where she is recognised by law as having power to act independently of or in opposition to her husband. *The Marquis of Antrim v. The Duke of Buckingham*, was also cited from 1 Ca. Chan. 17, which is found also in 16 Vin. Ab. 481, Com. Dig., *Poiar*, (C 1,) and 3 Salk. 276 ; which merely laid down that, where a feme sole reserves a power of leasing, and marries, her execution of that power is defective for no other reason than that her husband joined in making the lease. Supposing this decision sound (which may be doubted from other decisions reported in the same page, and from a case under the head *Authority*(a) in the same book) it certainly adds no force to the defendant's argument.

But in this case recourse was had to the principle that, where a power of appointment is executed, the party creating the power is considered in law as the party conveying, and the party who executes merely as an instrument in his hands. We think, however, that tenant for life with  
 \*432] power to grant leases is not in the \*situation of one who is merely empowered to appoint, but that he has a power coupled with an interest, which requires a bargain between independent persons, and a grant which is not void at law. The conditions annexed to every leasing power are for the benefit of the remainderman, and the protection of his interest in the property when the life estate shall have terminated : it is enough to refer for a statement of this doctrine to 1 Burr. 121, 122:(b) and, though such remainderman has his remedy on the covenants of the lease when his estate vests in possession, it is manifest that the protection may be lost for want of a liability in the lessee during the coverture. The mischief may be incurable after a long enjoyment with complete immunity.

We are therefore of opinion that the lessor of the plaintiff is entitled to  
 our judgment. Judgment for plaintiff

(a) Perhaps *Harris v. Graham*, 3 Vin. Abr. 419, *Authority* (B.) pl. 13.

(b) *Taylor v. Horde*.

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### HUGGINS v. COATES.

If any one of the securities for an annuity be set aside, the grantee may recover back the purchase money in an action for money had and received, for failure of consideration. Though it does not appear on what ground the security was set aside, nor whether the objection to it affects the validity of the annuity.

As, where a rule was obtained by the grantor to set aside the warrant of attorney and proceedings thereon, on grounds some of which would, and some would not, affect the validity of the annuity ; and the rule was made absolute in terms not showing which objection prevailed ; and no evidence was given on the point.

In such an action the evidence appearing as above stated, the statute of limitations runs from the time when the security is set aside, it not appearing that the considera-

tion has failed before that time. And the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid.

ASSUMPSIT for money had and received, for interest, and on an account stated. Pleas: 1 Non-assumpsit. Issue thereon. 2. That the supposed cause \*of action did not accrue within six years of the commencement of the suit. Replication: that the several causes of action did accrue within six years, &c. Issue thereon. [\*433]

Several other issues of fact were taken; but the question here turned only on those above mentioned.(a)

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1842, the plaintiff claimed 1500*l.*, (with interest,) as having been paid to defendant for the consideration of an annuity of 225*l.*, to be paid by defendant to plaintiff; which consideration, it was alleged, had failed. The payment of the 1500*l.* and the execution of the annuity deed, dated 13th June, 1826, were proved: but the memorial was not put in. There was no proof that any payment of the annuity had been made within six years of the commencement of the action. It appeared that among the securities given for the annuity was a warrant of attorney; that, in 1842, the defendant was taken in execution, at the suit of plaintiff, upon a judgment entered up thereon; and that defendant, on 19th of April, 1842, obtained the following rule of this court.

*“Huggins v. Coates.*

“Upon reading the affidavit of,” &c., “and the paper writings thereto annexed,” &c., it is ordered that the plaintiff, upon notice, &c., “shall, upon,” &c., “show cause why the warrant of attorney upon which judgment has been entered up in this action, and the judgment, and the testatum ca. sa. and the subsequent proceedings, should not be set aside; and why the \*defendant should not be discharged out of the custody of the sheriff of the county of Sussex at the suit of the plaintiff by the name of,” &c.: “on the ground, first, that the warrant of attorney is given to secure the payment of an annuity void by the annuity act, by reason of the memorial of the deed of grant of the said annuity being defective in the names of the parties, the deed being described therein as of three parts, and being of four parts, one John Billingshurst being a party to the said deed, and his name being omitted in the said memorial: secondly, by reason of the said warrant of attorney not having been properly described in the said memorial, the same being described as a warrant of attorney in the sum of 3000*l.*, instead of a warrant of attorney to confess judgment for that sum, and James Howarth and Andrew Freeman, mentioned as parties thereto, not being described as attorneys of the Court of King’s Bench, and it not being stated in the said memorial that the said warrant of attorney was for securing payment of the said annuity, and the consideration for the purchase of the said annuity, and how paid,

(a) See the judgment, post, p. 489.

and the amount of the said annuity, not being stated in the said warrant of attorney or memorial thereof: And also why the judgment and subsequent proceedings should not be set aside, and the said defendant discharged out of custody as aforesaid, on the ground that the warrant of attorney is not properly stamped, and that the judgment ought to have been revived by scire facias: And why the testatum ca. sa. issued thereon should not be set aside, and the defendant discharged out of custody as aforesaid, on the ground that the judgment is *In the matter of Huggins* as plaintiff, and the testatum ca. sa. is issued at the \*suit of Huggins;  
 \*435] and that the testatum ca. sa. is tested as having been issued in the year 1802: And for irregularity: with costs to be taxed," &c. "Upon the motion," &c.

The rule was afterwards made absolute, May 2d, 1842, in the following terms.(a)

"Upon reading the rule made in this cause on Tuesday the 19th day of April, in this term, the affidavit of," &c., "and the paper writings thereto annexed," &c., "and upon hearing," &c., (counsel for the plaintiff and defendant:) "It is ordered that the warrant of attorney, upon which judgment has been entered up in this action, the judgment and execution, and subsequent proceedings, be set aside without costs: and that the said defendant be discharged out of the custody of the sheriff of the county of Sussex, at the suit of the plaintiff in the name of Huggins And it is further ordered that the defendant shall not bring any action against any of the parties concerned in the execution, including amongst others the said sheriff."

The counsel for the defendant contended, first, that, the memorial not being put in, it did not appear on what ground the warrant of attorney and proceedings thereon had been set aside, and that therefore the annuity itself might still be valid, in which case there would be no failure of consideration: secondly, that, if the annuity itself was invalid, the failure of consideration existed at the time of paying the money in 1826, and therefore the statute of limitations was a bar. A verdict \*was taken,  
 \*436] by direction of the lord chief justice, for the plaintiff on the first and second issues, with leave to move as after mentioned.

In Hilary term, 1843, *Huggins* obtained a rule for entering a nonsuit on the first issue, or a verdict for defendant on the first and second issues.

*Platt* now showed cause.(b) As to the issue on non-assumpsit: the plaintiff has not the consideration on which the money was advanced, namely, an annuity secured by, among other securities, a warrant of attorney. The warrant of attorney has been set aside: and it is immaterial that there may or may not be other securities sufficient to protect the annuity. In *Cowper v. Godmond*, 9 Bing. 748, it was held that the purchaser of the annuity might recover back the price upon the warrant of

(a) See *Huggins v. Coates*, 1 Dowl. P. C. N. S. 827.

(b) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

attorney and proceedings thereon being set aside for a defect in the memorial, though the annuity deed was uncanceled. The earlier case of *Scurfield v. Gowland*, 6 East, 241, is to the same effect. Next, as to the issue on the statute of limitations. *Cowper v. Godmond*, 9 Bing. 748, is a direct decision that the statute begins to run, not on the payment of the money, but when the consideration fails, that is, when the security is invalidated, which here took place only in May, 1842. The grantor of the security, for whose benefit the statutory provisions respecting annuities were made, may never elect to set the security aside.

*Hoggins and Winsor*, contra. As to the issue on non-assumpsit. The rule nisi for setting aside the warrant of attorney specifies many objections; and the rule absolute does not show which prevailed. [\*437] The annuity may still be subsisting; for many of the objections would not tend to avoiding the annuity, as if the warrant of attorney were not properly stamped, or the judgment not properly revived. In *Scurfield v. Gowland*, 6 East, 241, the motion to set aside the warrant of attorney was made on a ground vacating the annuity, as was pointed out by the counsel for the plaintiff. [COLERIDGE, J. But Lord ELLENBOROUGH did not rely on that. He said: "The plaintiff contracted for one entire assurance, consisting of several securities: and he has a right to have that assurance entire, or to have back his money. The defendant has taken away one of his securities; and, therefore, the consideration for the money has failed."'] The memorial was defective, which vitiated the whole; *Duke of Bolton v. Williams*, 2 Ves. jun. 138, 154; S. C., 4 Br. Ca. Ch. 297, 310. That case, and *Scurfield v. Gowland*, 6 East, 241, were decided on stat. 17 G. 3, c. 26, s. 1. *Crosley v. Arkwright*, 2 T. R. 603; *Saunders v. Hardinge*, 5 T. R. 9, and an *Anonymous Case*, in 2 Chitt. Rep. p. 34, show that the act was considered to avoid the whole transaction wherever the memorial was defective. But now, by sect. 2 of stat. 3 G. 4, c. 92, which seems to have been passed with a view to the decision in *Scurfield v. Gowland*, 6 East, 241, the particular security only is invalidated, not the annuity itself, unless there has been no enrolment of the memorial of the annuity deed, which did not appear to be the case here. That distinction seems not to have been adverted to in *Cowper v. Godmond*, 9 Bing. 748. There, indeed, the court [\*438] relied upon *Waters v. Mansell*, 3 Taunt. 56, where the action was held to lie, though no direct step had been taken to avoid the security. But that was not necessary to the decision of *Cowper v. Godmond*, 9 Bing. 748: and it should seem that at least some intention to resist the claim for the annuity itself should appear. Next, if the first issue can be maintained by the plaintiff, the statute of limitations runs from the time when the money now claimed was received by the defendant; or at any rate from the last payment of the annuity. The plaintiff, if he has no consideration now, has had none within six years. In *Cowper v. Godmond*, 9 Bing. 748, payments of the annuity had been made within the six years; and the de-

defendant was held to have thereby treated the annuity as subsisting. If the transaction here was void, the statute has run; if voidable only, the action is premature, as the defendant has not sought to avoid the annuity.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (December 9th,) delivered the judgment of the court.

This was an action to recover back the consideration money paid for an annuity in the year 1826. One of the securities given was a warrant of attorney, on which judgment was entered up: but the warrant and judgment were set aside on motion in the year 1842, but it did not appear on what grounds. The defendant pleaded, amongst other things, the statute of limitations: but the verdict was taken for the plaintiff.

The defendant's counsel contended that this action would not lie, as it did not appear on what ground the \*warrant of attorney was set  
 \*439] aside, and it might be that the annuity was still a valid one. The case of *Scurfield v. Gwoland*, 6 East, 241, is an answer to this argument; where it was expressly held that the loss of one out of several securities makes a failure of the consideration for which the purchase money of the annuity was paid, and entitles the plaintiff to maintain this action.

Then the defendant's counsel contended that the statute of limitations was a bar, inasmuch as the annuity was void, and the six years began to run from the granting of it. The answer is, that there was no proof that the annuity was void. The ground on which the warrant of attorney was set aside did not appear, as he himself argued; and it might have been for some cause for which it was voidable only, and not void, and so the statute would not run until it was avoided, viz. not till 1842. It lay on the defendant, as to this issue, to show that the annuity was void ab initio, in order to bring into question the doctrine laid down in *Cowper v. Godmond*, 9 Bing. 748. It is true that the fourth plea states that there was no memorial, and goes on to add that there was no demand before action, and the replication traverses the demand only; (a) but this admission that there was no memorial is available only as to that issue, and cannot be taken into account as to the others.

This rule must therefore be discharged.

Rule discharged.

(a) On this issue, which it has not been thought necessary to set out in the report, the verdict was for the defendant.

**\*DAVID v. PREECE, HOPKIN and HARRY. [\*440**

To an action on a promissory note defendant pleaded *U* at the holder accepted another note, with an additional party, in satisfaction of the first. It appeared in evidence that this other note had been given and accepted in satisfaction, not of the note declared on, but of an intermediate note which had been given, without the additional party, in satisfaction of the note declared on.

*Held*, a variance: and that the judge at *Nisi Prius* had no power to amend the plea by substituting a description of the intermediate note.

**DEBT.** The first count was on a promissory note alleged to have been made by defendants, on 1st October, 1841, payable to plaintiff, for 20*l.*, six months after date. The second count was on an account stated.

The defendant Preece suffered judgment by default.

Pleas by defendant Hopkin:

1. To the first count; that defendant Hopkin did not make the note. Issue thereon.

2. To the second count; that defendant Hopkin was never indebted. Issue thereon.

3. To the whole declaration; that defendant Hopkin made the note, at the request of plaintiff and defendant Preece, only as surety, for securing to plaintiff a debt due from defendant Preece only; and that the account was stated in respect of the sum therein mentioned only; and that, after the note had become due, and after the said account had been stated, &c., and before the commencement of this suit, to wit 4th April, 1842, defendant Preece, and one David Preece his father, together with defendant Harry, made, and defendant Preece then delivered to plaintiff, who then received, a certain other promissory note, whereby defendant Preece, and the said David Preece his father, and defendant Harry, promised to pay to plaintiff or order 20*l.*, two months after date; which last mentioned note was so as aforesaid delivered to the plaintiff by the defendant Preece, and was so as aforesaid by plaintiff received, in full satisfaction and discharge of all the said debts and causes of action in the declaration mentioned: verification. Replication: that plaintiff did not receive the note in full satisfaction, &c.: conclusion to the country. Issue thereon. [\*441

4. To all the declaration; after a similar statement as to defendant Hopkin giving the note as a surety, and as to the account stated; that, after the said note had become due and payable, and after the said account had been stated as in the declaration mentioned, and before the commencement of this suit, to wit 4th April, 1842, defendant Preece, and one David Preece his father, together with defendant Harry, made a certain other promissory note, whereby defendant Preece, and the said David Preece his father, and Harry, promised to pay plaintiff or order the sum of 20*l.*, two months after date thereof, which last mentioned promissory note, being so made as aforesaid, defendant Preece, without the know-

ledge or consent of defendant Hopkin, afterwards, and before the commencement of this suit, to wit on, &c., delivered to plaintiff on account of the debts and causes of action in the declaration mentioned, and which said promissory note plaintiff, having full notice of the premises in this plea aforesaid, then, to wit on, &c., without the knowledge or consent of defendant Hopkin, received on account of the said debts and causes of action in the declaration mentioned, and then, in consideration of the premises in this plea aforesaid, agreed with defendant Preece to give him, Preece, time for payment of all the said moneys due to plaintiff in respect of the causes of action in the declaration mentioned, that is to say, until the said period of two months, in the said promissory note of defendant Preece and of his father David Preece and Harry mentioned, should have elapsed: verification. Replication: that there was no such agreement \*to give defendant Preece such time, &c., in manner and form, •442] &c.: conclusion to the country. Issue thereon.

Pleas by defendant Harry.

1. To first count; that defendant Harry did not make the note. Issue thereon.

2. To second count; that defendants did not promise, &c. Issue thereon.

3. To first count; that the note was made for and in consideration of certain wheat, to wit, &c., then, to wit on the day of making the said note, sold by plaintiff to defendant Preece, and there was not at any time any other consideration than as aforesaid for the making by defendant Harry of the note, or for his paying the amount thereof or any part thereof; and that he joined in making the note, and made the same, merely as a surety for defendant Preece, and at his request: that the note was, at the time of the making thereof by defendants as in the declaration mentioned, made payable, and was payable, to plaintiff or his order: and that, after the making thereof, and before the making of the other promissory note hereinafter mentioned, to wit on, &c., plaintiff endorsed the first mentioned note, to wit for a good and valuable consideration, to certain persons united in copartnership for the purpose of carrying on, and carrying on by and under the name of The National Provincial Bank of England, the trade and business of bankers in England, according to the form of the statute, &c., (7 G. 4, c. 46,) and the said National Provincial Bank of England then became and were the endorsees and lawful holders of the note, and so remained and were until and at and after the time when the said note became due, and until the making of the said other note, and the delivery of the same to them, and the receipt \*by them of the •443] same in satisfaction as hereinafter is mentioned. That the note in the declaration mentioned was not paid when due, and was dishonoured; and thereupon afterwards, to wit 10th April, 1842, plaintiff and defendants Harry and Preece, and one David Preece the elder, made their promissory note in writing, and thereby promised to pay to the said bank

or order the sum of 20*l.* at a certain time which elapsed long since, and before the commencement of this suit: and plaintiff, and defendants Harry and Preece, and the said David Preece the elder, then delivered the last mentioned note to the said bank in satisfaction as hereinafter is mentioned; and the bank then took and received and accepted the same from plaintiff and defendants Harry and Preece and the said David Preece the elder, in satisfaction of the said first mentioned note, and all causes of action in respect thereof. Verification. Replication: That the bank did not take, receive or accept the note in the plea in that behalf mentioned in satisfaction of the note in the first count mentioned, and all causes, &c., in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before MAULE, J., at the Glamorganshire Spring assizes, 1843, the making of the note mentioned in the declaration was proved; and it appeared that it became due on 4th April, 1842, having been previously discounted to the National Provincial Bank, and was then dishonoured in their hands. That plaintiff took the note up by a note dated 29th April, 1842, payable three months after date, drawn by defendant Preece, payable to defendant Harry, and endorsed by defendant Harry to plaintiff, and by plaintiff to the bank. That \*this bill became due on 2d July, and was then dishonoured; and that plaintiff took it up by a bill dated 9th July, 1842, drawn by defendant Preece and his father David Preece, payable to defendant Harry, endorsed by Harry to plaintiff, and by plaintiff to the bank; which last bill the plaintiff paid at maturity. The plaintiff's counsel objected that this evidence did not support the fourth plea of Hopkin or the third plea of Harry. The counsel for the several defendants proposed to amend those pleas, by making them conformable to the evidence: and the learned judge, after argument, permitted the amendments to be made, by substituting pleas describing the first renewal by the bill of 29th April, 1842. A verdict was then taken for plaintiff against Hopkin on the first and third issues, and for Hopkin on the second and on the fourth as amended; and for plaintiff against Harry on the first issue, and for Harry on the second and on the third as amended. Leave was given to move as after mentioned.

*E. V. Williams*, in Easter term, 1843, obtained a rule to show cause why the verdict for Hopkin on the fourth plea and for Harry on the third should not be set aside, and a verdict on those pleas entered for plaintiff; or why judgment should not be entered for plaintiff on the first count, non obstante veredicto.

*Chilton* now showed cause. This amendment was within the power of the judge at nisi prius. The plea misdescribed the instrument, so that there was a technical variance: but, in substance, the transaction was correctly described. The last note has been referred to, \*instead of the second; by accepting the last note the bank, in effect, took the security of the parties to the original note, with the additional security of Preece the father: and it can make no difference in the substantial

effect of the whole transaction that this note was given for ~~renewing~~, not the original note, but a note by which the original note had ~~been~~ renewed. [*E. V. Williams*. The pleas did not describe even the ~~second~~ transaction correctly, as to parties or other circumstances.](a) The effect was merely that a fresh party to the note was introduced.

*E. V. Williams*, contra, was stopped by the court.

LORD DENMAN, C. J. It is clear that, by this amendment, a transaction has been stated entirely different from that described in the plea. The learned judge, in my opinion, has gone too far. The counsel for the defendants assumes that the only substantial question was whether some note or other was not given in substitution for that declared upon: but that is not, I think, the defence which the plea sets up: the plea is that the particular note there described was substituted.

PATTESON, J. I am quite of the same opinion. The plea states that the note there described was given in satisfaction of the note mentioned in the declaration; whereas (even taking the description as correct, when applied to the third note) it was given in satisfaction of \*another,  
 \*446] which had been substituted for that in the declaration.

WILLIAMS, J., concurred.

COLERIDGE, J. You are striving, not merely to alter the description of the note in the plea, but to introduce new matter. It may be that the ultimate practical effect of the whole transaction would be the same; but the transaction which did take place is quite a different one from that described in the plea. Rule absolute.

(a) It was also stated that the plea, as amended, was not made consistent with the evidence of the first renewal: but on this the court did not decide.

END OF MICHAELMAS VACATION.

\*The following case is published at the earliest opportunity, on [\*447  
account of its practical importance.

### MERCER v. WHALL

Wherever, from the state of the record at nisi prius, there is any thing to be proved by the plaintiff, he is entitled to begin. The rule is the same in actions of contract and in actions of tort.

In covenant against an attorney for dismissing plaintiff, an articled clerk, from his service, defendant pleaded that plaintiff, after the making of the articles and before the discharge, conspired and combined with J. G., another attorney, by the unlawful means after mentioned to induce plaintiff's clients to leave him and employ J. G., and that plaintiff, *in pursuance of the said combination*, disclosed defendant's professional secrets to J. G., calumniated defendant to his clients, &c., (alleging various other acts of misconduct as done *in pursuance of the combination*;) whereby defendant was prevented from instructing plaintiff and retaining him in his service, &c.; and defendant, just before the discharge of plaintiff, *discovered and had notice of the premises*, and *was therefore forced to discharge*, and did, so soon as he discovered the premises, discharge, plaintiff from his service, as he lawfully, &c. Replication, *de injuriâ*. Issue thereon.

*Held*, that the plaintiff was entitled to begin.

*Held* also, that, on the above plea, the defendant was bound to show that he knew of the misconduct alleged in justification before he dismissed the plaintiff.

And *quære*, whether he ought not also to have shown that the acts complained of were done in pursuance of the alleged combination.

**COVENANT.** The declaration set forth articles under seal by which plaintiff was bound to defendant (an attorney and solicitor) as his clerk, for five years, and defendant covenanted that he would, during the said term, instruct plaintiff in the knowledge and practice of the law, &c.; and plaintiff, for the considerations aforesaid, and in consideration of 60*l*. yearly salary, covenanted that he would from thenceforth, during the said term of five years, faithfully and diligently serve defendant as his clerk, keep his secrets, perform his lawful commands, &c., not act as an attorney in any court without his consent, &c., not cancel, lend or make away with his papers, &c., and would assist him in extending and increasing his business, &c.: and defendant, for the considerations, covenants and agreement aforesaid, covenanted to plaintiff to pay him, during the five years, the said yearly salary of 60*l*. The declaration then averred that plaintiff entered the service, and served defendant \*until a certain [\*448  
day, to wit 14th March, 1844, and always well and truly ob-  
served and performed all things in the said articles, &c., on his part, &c.; and that, although he was always ready and willing, and offered defendant, to wit on, &c., so to observe and perform, &c., and so to serve defendant as such clerk, &c., and to be taught and instructed, &c., until the expiration of the residue of the said term, nevertheless defendant would not, during the said residue, &c., teach and instruct plaintiff, &c.: but on  
\*the contrary thereof, to wit on, &c., wholly refused so to do, and, against the

will and without the consent of plaintiff, discharged him from the service, contrary to the articles; by means whereof, &c.

Plea. That, before the making of the articles, defendant had purchased of the personal representatives of R. G., deceased, the goodwill and practice of his business as an attorney and solicitor, which he had carried on at, &c., and which is the same practice and business which defendant carried on at the time of the making of the said articles: that defendant, after such purchase, agreed to take plaintiff, &c., and entered into the said articles, and took plaintiff into his service as clerk, in manner and form, &c.: And that plaintiff, before the breach of covenant supposed in the declaration, "was guilty of gross misconduct which justified that breach, in this," that, after the making of the articles, and before the discharge of plaintiff, and before any breach of the covenant by defendant, and whilst plaintiff was engaged in defendant's service as his clerk under the articles, to wit on, &c., "he the plaintiff did wickedly and maliciously conspire, combine and agree with one J. G., who then was an attorney and solicitor, and professional rival of the defendant, at the place \*aforesaid,

\*449] and by the unlawful means and devices hereinafter mentioned, to deprive the defendant of the benefit of his said purchase, and to induce and procure divers clients of the defendant as such attorney and solicitor to cease to employ the defendant as such attorney and solicitor, and instead thereof to employ the said J. G. as such attorney and solicitor, and also to induce and procure divers persons, who otherwise would have employed the defendant as such attorney and solicitor, to employ the said J. G. as such attorney and solicitor instead: and the plaintiff then, to wit on the day and year aforesaid, and on divers other days after the making of the said articles, and whilst he was in the service of the defendant as such clerk, and before the supposed discharge and breach of covenant, in pursuance of the said agreement and combination, wrongfully and unlawfully, and with intent to disclose the professional secrets of the defendant to the said J. G., and to destroy the confidence of the defendant's clients in the defendant," &c., "and to injure and ruin the defendant in his said business as an attorney and solicitor, in the absence of the defendant and without his consent or knowledge, did introduce into the private office of the defendant, wherein he carried on his business as such attorney and solicitor as aforesaid, the said J. G., then being an attorney residing and practising at," &c., "aforesaid, and who had no right to be in his said private office or to be informed of the business of the defendant, but on the contrary was a professional rival of the defendant; and the plaintiff did then on the occasions aforesaid, with the like intent as aforesaid, communicate and betray to the said J. G. divers professional secrets of the defendant, and divers matters and \*things relating to the clients and business of the defendant, which it was the duty of the defendant as such attorney and solicitor as aforesaid, and the plaintiff as such articulated clerk as aforesaid, to keep secret," &c. The plea imputed various

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other acts of misconduct to the plaintiff, as disclosing the defendant's professional correspondence, and other documents, &c., to J. G.; calumniating defendant to clients in respect of his business; absenting himself and neglecting the business; drawing and engrossing deeds, &c., as an agent on behalf of other persons than defendant, without his consent; causing professional documents in defendant's office to be copied without his consent, and allowing J. G. to use the copies, &c., he being an attorney, &c.; lending professional documents to J. G. without defendant's knowledge and against his will; fraudulently inducing clients to transfer their business to J. G.; and doing business for clients of defendant as his clerk, and not entering it in defendant's books. Most of these acts were stated to have been done in pursuance of the said combination, &c. And it was finally alleged that defendant, if he had kept plaintiff in his service, would, by reason of plaintiff's delinquency and unfitness, have been ruined in his business: "Whereby the said defendant was prevented from teaching and instructing the plaintiff and retaining him in his service as clerk according to the said covenant, as he otherwise might have done and was ready and willing to do, and then(a) and the defendant just before the supposed discharge and breach of covenant, to wit on the 14th day of March A. D. 1844, discovered and had notice of the premises in this plea mentioned, \*and was therefore then forced and compelled to, and did, so soon as he discovered the premises, dismiss and discharge [\*45] the said plaintiff from his service, and from being such clerk as aforesaid, and committed the supposed breach of covenant in the declaration alleged as in the said declaration mentioned, as he lawfully might for the cause aforesaid." Verification.

Replication. That, although true it is, &c., (admitting the introductory statements of the plea as far as the defendant's taking the plaintiff into his service;) nevertheless defendant of his own wrong, and without the residue of the cause, &c., broke this said covenant, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Derbyshire Summer assizes, 1844, a question arose as to the right to begin; and his lordship ruled that the plaintiff had that right, since it lay on him to prove some damage. The plaintiff called Joseph Gratton: the defendant's counsel cross-examined him as to the alleged acts of misconduct on the part of the plaintiff, and called no witnesses. The lord chief justice, in summing up, left it to the jury to say whether any of the acts were proved, and were such breaches of duty as to warrant dismissing the plaintiff: and he further told them that it ought to have been proved, in support of the plea, that the defendant, at the time of the dismissal, had notice of the matters charged against the plaintiff. Verdict for plaintiff; damages 300*l*.

*Whitehurst*, in Michaelmas term, 1844, obtained a rule nisi for a new trial on the grounds of misdirection, and of an improper ruling on the

(a) So on the nisi prius record.

\*452] right to begin, \*and that the verdict was against the weight of evidence.(a) In Easter term, 1845,(b)

*Hill* and *Humfrey* showed cause. This court has intimated that it will not grant a new trial merely because it differs in opinion from the judge at nisi prius as to the right to begin; *Burrell v. Nicholson*, 1 M. & Rob. 304; *Bird v. Higginson*, 2 A. & E. 160. In *Huckman v. Fernie*, 3 M. & W. 505, this doctrine seems to have been questioned; but the judge's ruling on the trial was supported. At all events there is no authority for granting a new trial on this ground unless the judge has thrown the onus of proof on the wrong party, he objecting. The principle generally recognised has been that, if the plaintiff must, in order to obtain a verdict not merely nominal, give some evidence, it lies on him to begin. [Lord DENMAN, C. J. The case I have always gone upon is *Curtis v. Wheeler*, Moo. & M. 493, where Lord TENTERDEN held that, when the record "presents an issue the affirmative of which is on the plaintiff, and on proof of which he would be entitled to a verdict," the plaintiff is to begin.] In *Wood v. Morewood*, 3 Q. B. 440, note,(c) the action was for getting coals under the plaintiff's land; and, the defendant setting up a right, PARKE, B., held that he ought to begin; yet it was clear, in the course of the trial, that the real question was the amount of damages, and that the right had been alleged merely that the defendant might begin.

\*453] Some \*judges have held that, if there were any unascertained damages, the plaintiff should begin: others, that that is so only where the unascertained damages are the substantial matter in dispute, as in *Hoggett v. Oxley*, 2 M. & Rob. 251, and not if the real object is to try a right, as in *Burrell v. Nicholson*, 1 M. & Rob. 304. Others have considered the test to be whether the plaintiff would have a verdict, though for nominal damages only, if no evidence were given on either side.(d) An exception to the rule, that the party on whom an affirmative lies shall begin, was agreed upon by the judges with respect to actions of slander and libel, and some others; *Carter v. Jones*, 1 M. & Rob. 281; S. C., 6 Car. & P. 64,(e) (where the statement of TINDAL, C. J., is differently reported in Moody and Robinson and Carrington and Paine:) and the resolution promulgated in that case was explained shortly afterwards by Lord DENMAN, C. J., in *Burrell v. Nicholson*, 1 M. & Rob. 304. The rule ought to be settled without reference to any supposed advantage in beginning; the existence of which advantage is, strictly, not consistent with justice. [WIGHTMAN, J. I always thought a safe rule was that, even if the affirmative lay on the defendant, still, if the plaintiff would have to give some evidence in case the defendant failed in his

(a) The court, on motion by the plaintiff, ordered that the case should not be set down in the new trial paper.

(b) April 28th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

(c) But not on this point.

(d) See *Ridgway v. Ewbank*, 2 M. & Rob. 217; *Bonfield v. Smith*, 2 M. & Rob. 519.

(e) See p. 462, post.

proof, the plaintiff ought to begin. PATTESON, J. I have been inclined to hold, as much as I could, that the party on whom the issue lay should begin. In some cases it must be so; as if the only plea is a release by deed, and the replication is non est factum. Lord DENMAN, C. J. A case which I have felt severely pressed by, though I have twice acted in contradiction \*to it during the last assizes, is *Stanton v. Paton*, 1 Car. & Kir. 148, where, to a declaration for breach of promise of marriage, the defendant pleaded that before the alleged breach the parties had, by agreement, released each other from their promises; the replication traversed the agreement; and Lord ABINGER, after consulting my brother PATTESON, ruled that the defendants should begin.] That case seems contrary to principle; though there are authorities for as well as against the decision. *Rowland v. Bernes*, 1 Car. & Kir. 46, agrees with it. [\*454]

Then as to the misdirection. [Lord DENMAN, C. J. I put it to the jury to say whether any of the acts alleged in the plea were proved; and, if they were, whether they warranted the dismissal. PATTESON, J. I think that was leaving it too favourably for the defendant.] And, to support this plea, it was necessary, as the lord chief justice observed, to show that the defendant knew of the alleged misconduct at the time of the dismissal.

*Whitehurst, Waddington and Mellor*, contra. The proposition, that the court will not interfere if the judge at nisi prius has allowed the wrong party to begin, is not borne out by *Burrell v. Nicholson*, 1 M. & Rob. 304, or *Bird v. Higginson*, 2 A. & E. 160, and the ruling in those cases did not warrant interference; a contrary doctrine is laid down in *Huckman v. Fernie*, 3 M. & W. 505, and in *Mills v. Barber*, 1 M. & W. 425; S. C., Tyr. & G. 835; *Lewis v. Lady Parker*, 4 A. & E. 838; *Bedell v. Russell*, Ry. & M. 293, and *Bonfield v. Smith*, 2 M. & Rob. 519, the decision at nisi prius as to beginning was \*evidently considered open to revision. As to the right itself; ever since the decisions in *Cooper v. Wakley*, Moo. & M. 248, and *Cotton v. James*, Moo. & M. 273, it has been received as the general rule, that he who had the affirmative of the issue to sustain is entitled to begin; *Pearson v. Coles*, 1 M. & Rob. 206, is an instance; and in *Cotton v. James*, Moo. & M. 273, Lord TENTERDEN, expressly states the law to be so established. The rule cannot be that, if the plaintiff must give some evidence in order to succeed, he is entitled to begin. [PATTESON, J. I have always thought the general rule to be, that, if on the defendant's proof failing the verdict might directly be given for the plaintiff, as would be the case where the damages were fixed, or merely nominal, the defendant should begin.] It would be difficult to say, even in actions to try a right, whether the damages were nominal or otherwise. In an action for cutting down a post some question might arise as to damages. [Lord DENMAN, C. J. The judge takes upon him to say whether the plaintiff really proceeds for [\*455]

damages, or whether a right only is in question; though the plaintiff may dissent from the judge's statement if he pleases.] The rule appears, in the late cases, to have been generally laid down, without reference to the question as to damages, that the party on whom the proof of an issue lies shall begin. In *Cotton v. James*, Moo. & M. 273, the defendant began, though the damages were not fixed. On the same view of the law the defendant was allowed to begin in *Pole v. Rogers*, 2 M. & Rob. 287. [PATTESON, J. There the amount of claim was fixed.] In *Reeve v. Underhill*, 1 M. & Rob. 440, and *Wootton v. Barton* 1 M. & Rob. 518, the defendants \*began, because the onus probandi lay in the first instance \*456] on them, though the damages were unliquidated. The same observation seems applicable to *Wood v. Morewood*.(a) Lord ABINGER's ruling in *Stanton v. Paton*, Car. & Kir. 148, is a strong authority for the defendant. The only rule consistent with principle is, that that party shall begin who is bound by the state of the record to begin; that is, to open the case by evidence. The resolution of the judges reported in *Carter v. Jones*, 1 M. & Rob. 281; S. C., 6 Car. & P. 64,(b) appears to have been a violation of principle, but to have been adopted for convenience, and to prevent hardship in the particular cases specified. [Lord DENMAN, C. J. The judges who there overruled the decision in *Cooper v. Wakley*, Moo. & M. 248, did so, not because it created a hardship, but because they thought it was against law.] It does not appear, then, why the resolution was confined to particular injuries. [Lord DENMAN, C. J. Because the contrary had been ruled only with respect to such injuries.]

As to the misdirection, the plea alleged numerous acts of misconduct; and the question whether any of them was proved, and amounted to a justification, was left to the jury too generally. It involved matter of law, which should have been explained more particularly, and with reference to the individual charges. And, if the judge did not state what particular acts would afford a justification in law, he should have desired the jury to say what acts they found to be proved. But it may be admitted that this would have been difficult in so multifarious a plea. [PATTESON, J. All the things alleged to have been done, except two or three \*457] \*which do not seem to have been proved, are referred to the conspiracy. If the jury did not believe that there was a conspiracy, what became of your plea?] The acts themselves, without conspiracy, were sufficient; and the conspiracy may be laid out of the case, as the riot was in *Cohen v. Huskisson*, 2 M. & W. 477. [PATTESON, J. I think not, the acts being laid as they are in this plea.] As to the knowledge of the plaintiff's misconduct; it is sufficient that the acts really took place before the dismissal. [Lord DENMAN, C. J. The defendant pleads that he discovered and had notice of the misconduct just before the discharge, and was therefore forced and compelled to, and did, so soon as he discovered the premises, dismiss and discharge the plaintiff. Those allego-

(a) See 3 Q. B. 440, note.

(b) See p. 462, post.

tions are not material. If a good ground for discharge exists, it is not necessary that the master should state it, or even know it at the time of discharging; *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171; *Baillie v. Kell*, 4 New Ca. 638. The case is like that of an officer arresting under a bad warrant but having a good one in his possession; *Groenvell v. Burwell*, 1 Ld. Ray. 454; or seizing goods for an alleged cause which is insufficient, but having at the time a good justification under legal process; *Crowther v. Ramsbottom*, 7 T. R. 654. [Lord DENMAN, C. J. I have always thought, in the case of the servant, that the existence of the real cause, which he knew, laid him under a sort of personal disability to allege that he was dismissed for another cause which was insufficient. But, where the master alleges a wrong cause, and his own knowledge of it, as the ground of a plea, the case may be different.] The substance of the \*plea is that the plaintiff has been guilty of the act; the rest is surplusage. The "residue of the cause," [\*458 put in issue by the replication, is so much of the facts as is correctly alleged. It is sufficient that part of the justification pleaded was proved, if that part amounts to a defence; *Morrish v. Murrey*, 13 M. & W. 52, 57, per ALDERSON, B. (*Humfrey* cited *Cussons v. Skinner*, 11 M. & W. 161.) The point as to knowledge of the cause of dismissal does not seem to have been argued there. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The natural course would seem to be that the plaintiff should bring his own cause of complaint before the court and jury, in every case where he has any thing to prove either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him.

The law, however, has by some been supposed to differ from this course, and to require that the defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact which if proved will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial, anticipating the plaintiff's statement of his injury, disparaging him and his ground of complaint, offering or not offering, at his own option, any proof of his defensive allegation, and, if he offers that proof, adapting it, not to plaintiff's case as established, but to that which he chooses to represent that the plaintiff's case will be.

\*It appears expedient that the plaintiff should begin, in order that the judge, the jury, and the defendant himself, should know [\*459 precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with a full understanding of its nature

and character. If it were a presumption of law or if experience proved that the plaintiff's evidence must always occupy many hours, and that the defendant's could not last more than as many minutes, some advantage would be secured by postponing the plaintiff's case to that of the defendant. But, first, the direct contrary in both instances may be true; and, secondly, the time would only be saved by stopping the cause for the purpose of taking the verdict at the close of the defendant's proofs, if that verdict were in favour of the defendant. This has never been done or proposed: if it were suggested, the jury would be likely to say, on most occasions, that they could not form a satisfactory opinion on the effect of the defendant's proofs till they had heard the grievance on which the plaintiff founds his action. In no other case can any practical advantage be suggested as arising from this method of proceeding. Of the disadvantages that may result from it, one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and \*affirming something by way of defence which he knows to  
 \*460] be untrue, for the mere purpose of beginning. Take one or two cases. Trespass: plea; leave and license: the plaintiff wishes to show that extensive damage has been done to his property for the purpose of wilful oppression. But the defendant affirms, and must begin. It is obviously necessary for him to state some case for the plaintiff, to show that the supposed license applies to it. He brings evidence to prove a license. When the plaintiff's turn comes, he clearly shows that the license set up cannot apply to the trespass complained of. The real trial now commences; and the whole time given to the defendant's statement and evidence in support of his affirmation has been thrown away. Action for criminal conversation: plea; that the plaintiff had deserted his wife: so the defendant is to begin, and possess the jury with an affecting detail of cruelty and infidelity. He purchases this right only by admitting his adulterous intercourse, an admission which would seem to supply no very good reason for conferring any advantage upon him. He makes his attempt by calling some evidence: whether he fails or succeeds cannot be known till the whole case is closed; but the plaintiff brings forward his own complaint, the defendant's conduct, the extent of his injury, the just amount of damages, with the disadvantage of first struggling against the heavy charge with which he is loaded. Possibly the defendant makes no such attempt; but his affirmation on the record gives him the right to introduce the plaintiff's case by stating his infamy without proof, and by proving every circumstance of disparagement and degradation short of the fact which he has pleaded.

\*461] It is not wonderful that little authority should be found on this point. Very few nisi prius cases were formerly reported. What is called the right to begin was in many instances rather a burden than a benefit; and a general opinion prevailed that the course adopted by the

presiding judge at the trial was not subject to revision in any other court. But I can speak of my own impression arising from attendance at nisi prius as a barrister near thirty years, and corresponding, as far as I have observed, with the general opinion of the bar. I never doubted that the plaintiff was privileged and required to begin, whenever any thing was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption if the question were new, and would raise a great probability that the common sense of old times had sanctioned it as a part of our system. It frequently occurred that, in an action of trespass, with plea of justification under a right, the defendant claimed to begin. He said: "I admit the trespass; and the burden of proving the defence rests on me." The answer constantly given was: "I the plaintiff have the right to begin, because I go for substantial damages. I claim to disprove your right in the first place, if I think proper, but at all events to possess the jury of the extent of the mischief you have done me." On such occasions the judge took upon himself to decide whether the plaintiff really went for substantial damages. If he did, it was always assumed that he must begin. The judge perhaps decided this matter without very adequate materials; but he would not have thought of doing so at all if the right depended on the issue as it appeared on the record.

\*I am well aware of the decision in *Cooper v. Wakley, Moo. & M. 248*. In an action for a libel on a surgeon, charging want of skill in an operation, the defendant justified, pleaded the truth of his charge, and contended that, as the sole issue was affirmative, he had the right to begin by proving it. Lord TENTERDEN doubted, and, after consulting two other judges then sitting in an adjoining court (BAYLEY and LITTLEDALE, Js.,) determined in the defendant's favour. No three judges who ever sat together in Westminster Hall have commanded more respect than these. Yet an appeal may be made to all who were then practising at the bar, whether the decision was not universally felt to be wrong, both as against principle and as an innovation. [\*462]

Soon after I was raised to the bench, this ruling became the subject of discussion among the judges. Many of them attended at my house to consider of it; and the following short resolution was drawn up and signed by those present, and afterwards adopted by Lord LYNTHURST, C. B., BAYLEY, B., TAUNTON, J., and myself. "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant." (a) I possess this document signed with the initials of the present chief justice of the common pleas, of Sir J. B. BOSANQUET and of the late Mr. Justice PARK, LITTLEDALE, and GASELEE, Js.,

(a) Humfrey, in showing cause in the present case, referred to a statement made by Parke, B., as to this resolution, on the motion in *Geach v. Ingall*, then standing in the new trial paper in the Exchequer.

**BOLLAND and GURNEY, Bs.** Among the judges who adhered to this retraction of the decision in *Cooper v. Wakley*, Moo. & M. 248, were the  
 \*463] \*two whom I have named as assessors to Lord TENTERDEN when that decision was made. His own opinion on the principle may be gathered from what he said in *Cotton v. James*, Moo. & M. 273. If ever a decision was overruled on great deliberation and by an undeviating practice afterwards, it is that in *Cooper v. Wakley*, Moo. & M. 248.

An ingenious argument was used at the bar, that this resolution did not declare the law as the judges understood it, but merely enacted a new practice which they thought more convenient than the old. But I cannot think this explanation admissible. The judges have never assumed the right of sacrificing the law to their sense of convenience. The balance of convenience might have some effect on their minds as an argument to show how the rule of practice was; but their duty was limited to a declaration of that rule, which they never would have promulgated if they had not believed it to be the law. The rule of practice thus declared is confined to the case then under consideration, wisely avoiding any matters not then before the judges. Contented with the correction of what was thought a grievous mistake, they excluded from their consideration every other point, and left the practice on actions of contract in its former state.

How then did that practice stand? Taking it now to be established as it has just been described in cases of tort, the first question seems to be, why any difference should exist between the two classes? There is the same general reason; the propriety of first hearing from the plaintiff the  
 \*464] nature of his complaint, and his estimate \*of the damage sustained. There is often the same question to be tried in assumpsit or covenant as in libel, slander or injuries to the person. Action for breach of promise to marry: plea; defendant broke his promise because plaintiff was guilty of fornication. Can any reason be assigned for allowing the defendant to begin in this case rather than when he pleaded the same facts as a justification in libel or slander? The very case now before us is an example. Covenant by an attorney's clerk for improperly dismissing him: plea; he was guilty of misconduct in the service. On what principle can it be right for the plaintiff to begin if the same plea were pleaded as a justification for libel or slander, and to follow the defendant when the very same facts are made the excuse for breach of covenant? Suppose a plea that the contract was rescinded, to an action for breach of marriage promise: according to the present argument, the proof of rescission must precede the proof of contract. The record, in duly stating such a contract, gives no information as to the real understanding between the parties. There is probably a correspondence; the letters which the defendant selects as rescinding may appear to have that effect when presented alone;

quite the contrary with reference to those from which, combined with conduct, the engagement itself must be inferred. Surely the proposed order of proceeding is full of embarrassment, inconvenience and confusion.

In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the defendant can establish a certain fact in answer; and, if, in an action for damages, the \*damages are ascertained, and the plaintiff has a *prima facie* case on which he must recover that known amount and no more unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But, if the extent of damage is not ascertained, the plaintiff is the person to ascertain it, and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are intrusted with the decision. [\*465]

We do not deem it necessary to discuss the numerous cases recently reported from *nisi prius*; for they only prove the unsettled state of judicial opinion on this subject: but, for the reasons now given, we think that the plaintiff was entitled to begin on the present occasion.

A second objection was, that the judge held the plea not to be proved, because the conspiracy to injure the defendant was not proved. It was said that this ought to have been submitted to the jury. I did submit it to the jury, with a strong observation that in my opinion it was not proved, in which I understood the defendant's learned counsel to acquiesce. If I had been desired to ask their opinion on the effect of the evidence in support of that charge, I should have entered more particularly into it, and have no doubt the result would have been the same. Whether the overt acts alleged and proved were such breaches of duty as to warrant the plaintiff's dismissal was the point left to the jury: and here a difference of opinion arises in the court. Some of us are disposed to think that, on this particular issue, it should not have been left to the jury to say whether the acts proved warranted the dismissal, but \*that the jury should have been told that, as the plea alleged a conspiracy and none was proved, the issue must be found for the plaintiff. The defendant, however, has not sustained any injury by the way in which it was left to the jury. He had a chance thereby given him, to which perhaps he was not entitled. The question therefore becomes an immaterial one, as the conspiracy was not proved, nor another averment in the same plea: viz. that the defendant gave the plaintiff notice of the charges against him. The case of the *Hungerford Market Company*,<sup>(a)</sup> was, indeed, cited, which shows that the misconduct of the servant may justify the master in an action for dismissing him, though neither the servant was apprized of the [\*466]

(a) *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171.

charge against him, nor the master knew of the fact. That case is right, because, if good ground of dismissal existed, the plaintiff suffered no wrong from the dismissal from not having been accused of it. But, when the plea embodies the master's knowledge with the cause of dismissal, that knowledge becomes a part of the description of the offence, and might mislead in material points by directing the plaintiff's attention to an entirely different set of facts.

There is therefore no ground for a new trial; and the rule must be discharged.

Rule discharged.(a)

(a) The following decision took place in Michaelmas term, 1844.

## \*COLLIER v. CLARKE and Another.

[\*467]

**Replevin.** Cognisance for rent in arrear. Pleas in bar: 1. that defendants were not the bailiffs, &c.; 2. riens in arrere; 3. that the distress was not made within twenty years next after the time when the right to distrain first accrued to the person through whom title to the rent was made, and that such person discontinued receipt of the rent more than twenty years before the distress was made, and that no such rent was paid or received, or distrained or sued for, within twenty years next before the distress. Replication, that the distress was made within twenty years next after the time when the right to make a distress for the said rent first accrued. Issue thereon. *Held*, that on the trial of this issue the plaintiff was entitled to begin, since it lay on him to show when the distress was made.

**REPLEVIN,** Cognisance by defendants, as bailiffs of James Hulme, for arrears of a rent charged upon certain lands held in fee, and which rent was granted in 1801 by James Jennings and another to Thomas Ollivant and others. Title was deduced from these parties to James Hulme through William Hulme, who died seised as in fee of the rent, February, 5th, 1825. Verification.

Pleas in bar. 1. That defendants were not the bailiffs, nor was either of them the bailiff, of James Hulme. Conclusion to the country.

2. No rent in arrear. Conclusion to the country.

3. "That the said distress in the said cognisance mentioned was not made at any time within twenty years next after the time at which the right to make a distress for the said yearly rent or sum of 34*l.* 1*s.* 7*d.* first accrued to the said William Hulme being the person through whom the said James Hulme, in the said cognisance last mentioned, at the said time when, &c., claimed, and now claims, the same; and that the said William Hulme, having been in receipt of the said rent, did, whilst so entitled thereto, and more than twenty years before the making of the said distress in the said cognisance mentioned, discontinue the receipt of the said rent, and that no such rent has been paid or received, or distrained for or sued for, at any time within twenty years next before the making of the said distress in the said cognisance mentioned." Verification.

Replication. Similiter to the first two pleas.

To the third plea: "That the said distress in the said cognisance mentioned was made within twenty years next after the time at which the right to make a distress for the said yearly rent or sum of 34*l.* 1*s.* 7*d.* first accrued to the said William Hulme." Conclusion to the country. Issue thereon.

On the trial, before COLKINER, J., at the Chester Summer assizes, 1844, the learned judge ruled that the plaintiff ought to begin; and he did so, and obtained a verdict.

*Jervis* now moved for a new trial on the ground that, on this record, the defendants had the right to begin. The test is, who would have obtained the verdict if no evidence had been given? [Lord DENMAN, C. J. The question is, upon whom the affirmative lies. I believe that doctrine \*is free from difficulty; and I got it from Lord TENTERDEN.] The material question here was, whether the distress in the name of James Hulme was made within twenty years next after the time at which William Hulme had the right to make such distress; and it lay on the defendants to show that the distress was so made. There was no disputed affirmative to be proved before that. The allegation that William Hulme discontinued the receipt of the rent, is not such an affirmative; for it means no more than that W. Hulme ceased to receive rent in point of fact; it does not of itself imply that a cessation of the right commenced from that time. To raise that point it should have appeared that some act had been done or submitted to by W. Hulme, creating a positive discontinuance. As to this, *Jervis* referred to *Doe dem. Davy v. Oxenham*, (7 M. & W. 131,) and *Grant v. Ellis*, (9 M. & W. 118.)

[\*468]

Lord DENMAN, C. J. I have no doubt that the learned judge was right in calling on the plaintiff to begin. The issue on this part involved an affirmative which he was bound to prove; namely, the time at which the distress was taken.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

The rule was refused on this point, but a rule nisi granted on others.

See the cases on the right to begin, collected in Roscoe on Evidence, 175—177., 6th ed.

# CASES

ARGUED AND DETERMINED

IN

## THE QUEEN'S BENCH,

IN

### Michaelmas Term and Vacation,

VII. VICTORIA.

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The judges who usually sat in banc in this term and vacation were,  
Lord DENMAN, C. J. COLERIDGE, J.  
PATTESON, J. WIGHTMAN, J.

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#### MOULD v. EDWARD JONES WILLIAMS and EDWARD WILLIAMS.

Under the Highway Act, 5 & 6 W. 4, c. 50, s. 73, (whereby, if any timber, &c., is laid upon the highway so as to be a nuisance, and is not, after notice, removed, the surveyor, by order in writing from one justice, may remove the same) a justice, on information, summons and hearing, made an order in writing for the removal of plaintiff's timber, recited in such order to be laid upon a highway; and the timber was accordingly removed:

Held that, in an action of trespass against the magistrate, plaintiff could not give evidence, in contradiction to the order, that the locus in quo was not a highway.

TRESPASS for seizing and taking away plaintiff's goods, to wit 100 pieces of timber, &c., then lying on a piece of ground abutting, &c., and carrying away and converting the said goods. Plea: not guilty, by statute. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after Michaelmas term, 1843, it appeared \*that the defendants were justices of the peace for the county of Middlesex, living at Enfield, near which the plaintiff resided. The other material facts of the case were stated as follows in the judgment of this court on the after mentioned motion. [\*470]

“Under sect. 73(a) of the Highway Act, the surveyor of the highways

(a) Stat. 5 & 6 W. 4, c. 50, s. 73, enacts, “That if any timber, stone,” &c., “or other matter or thing whatsoever shall be laid upon any highway so as to be a nuisance, and shall not, after notice given by the surveyor, assistant surveyor, or district surveyor, be forthwith removed, it shall and may be lawful for the surveyor, assistant surveyor,” &c., “by order in writing from any one justice, to clear the said highway by removing the

in the parish of Enfield gave the plaintiff notice to remove certain timber lying in and obstructing the highway. The timber not having been removed, the same officer summoned the plaintiff(a) to show cause before the magistrates why the timber should not be removed from the highway. The plaintiff attended the summons. The surveyor gave his information upon oath, and, after a hearing, requested the magistrates to issue their warrant for removing the timber from the highway. They issued their warrant, reciting these proceedings, and directing the surveyor to remove the timber from the said common and public footpath. For the \*surveyor's execution of this warrant the magistrates are sued as trespassers, on the ground that they had no jurisdiction, because the place where the timber was removed was not part of the highway or common footpath."

\*471] The warrant was produced at the trial.(b) The \*plaintiff's counsel proposed to show that the land on which the timber was

said stone," &c., "or other matter or thing as aforesaid, and to dispose of the same, and to apply the proceeds arising therefrom towards the repairs of the highway within the parish in which such highway may be situate."

(a) The summons, under the hand and seal of one of the defendants, recited a complaint and information of the surveyor to him, that the plaintiff had, contrary to the statute, &c., caused timber to be laid on a common footpath, and continued the same, &c., notwithstanding a notice from the assistant surveyor to remove the same: to the damage and common nuisance, &c. And it required the plaintiff personally to appear before the justices in petty sessions, at, &c., on &c., to answer the information and complaint of the assistant surveyor; who was likewise ordered to attend and make good the same.

(b) The warrant or order was as follows:

"Middlesex to wit. To Henry Young, of," &c. "assistant surveyor of the highways in the parish of Enfield in the said county, duly appointed," &c. "Whereas complaint and information were on the 21st day of June instant made before the undersigned Edward Jones Williams, Esquire, one of her majesty's justices of the peace for the said county, by John Mead, of," &c., "that Lestock Mould, then or then late of," &c., "carpenter, on the 1st day of January last, in the year 1842, unlawfully and injuriously and contrary to the said statute, at the parish aforesaid, in the county aforesaid, did lay or cause to be laid certain timber and wood and other materials and things in and upon a common public footpath there for all the queen's subjects to pass and repass on foot at their free will and pleasure, and the said timber," &c.; averment, that he continued the same nuisance for a long time afterwards, to wit, &c.; "although, before the day of making the said information, the assistant surveyor of the said parish, duly appointed," &c., "did give to the said Lestock Mould notice as is required by the said statute to remove the said timber and wood," &c.: whereby the said queen's subjects during all the time aforesaid could not nor did they then go, return, pass and repass on foot in, through, and along and over the said footpath as they before the said 1st day of January used and were accustomed to do, and still of right ought to do, to the hindrance, damage and common nuisance of all the said queen's subjects in going, returning," &c., "in, through and over the said footpath: and whereas the said Lestock Mould, having been duly summoned to appear before the justices of the peace for the said county in petty sessions, this day attended at the police office in Silver Street, in the parish of Enfield in the said county, to answer to the said information and complaint, but hath not shown unto us any good cause why the said timber," &c., "should not be removed and disposed of according to the said statute: and whereas the said Henry Young hath this day made an information and complaint on oath before us the undersigned, two of her

laid formed no part of the highway; for which reason, as was contended on his part, the justices had not jurisdiction. The lord chief justice held such evidence inadmissible, and directed a nonsuit.

*Bramwell* now moved for a new trial. The order of justices was not conclusive. The cases in which convictions have been held so are not applicable. Here the statute does not call upon the justices to convict, but authorizes them to make an order, under which the surveyor may remove the alleged nuisance. It does not even require that notice of the application for an order shall be given to the person whose property is to be affected. Such an order cannot be valid if the facts do not bear it out. In *Bramwell v. Penneck*, 7 B. & C. 536, a man \*who had been left in possession of goods seized under a fi. fa. laid an informa- [\*473 tion against the attorney who had employed him, for non-payment of his wages: the justice issued a summons, heard the complaint and answer, and made an order upon the attorney to pay; which not being done, he issued a distress warrant against the attorney's goods, under stat. 20 G. 2, c. 19. This court held that the man in possession was not a servant within the statute, and that trespass lay against the magistrate; and they stated distinctly as a ground, not that the warrant failed to show jurisdiction, but that the magistrate had not jurisdiction in fact, because the informer was not a labourer within the statute. [Lord DENMAN, C. J. I thought here that *Brittain v. Kinnaid*, 1 B. & B. 432, was applicable, and that the justices had jurisdiction to try whether the place in question was a public highway or not.] *Bramwell v. Penneck*, 7 B. & C. 536, is a later decision. [COLERIDGE, J. *Brittain v. Kinnaid*, 1 B. & B. 432, has been oftener recognised than almost any modern case.] In *Basten v. Carew*, 3 B. & C. 649, which was cited at the trial, the justices had drawn up a record of proceedings had before them under stat. 11 G. 2, c. 19, s. 16;

majesty's justices of the peace for the said county at and in the said petty session assembled, to the effect and as in the said information and complaint of the said John Mould is mentioned and set forth, and also that the said Lestock Mould, at the parish aforesaid in the county aforesaid, unlawfully, injuriously and contrary to the statute aforesaid, doth continue to lay or cause to be laid in and upon the said common public footpath the timber," &c., "aforesaid, although, before the day of making his said affidavit and complaint, he the said H. Y., as such assistant surveyor duly appointed as aforesaid, did give or cause to be given to the said Lestock Mould notice, as is required by the said statute to be given, to remove the said timber," &c.: "whereby the said queen's subjects cannot now go, return," &c.: "to the damage, hindrance and common nuisance," &c.: "and where the said H. Y. hath this day requested us, in writing under his hand pursuant to the said statute, to grant to him the said H. Y., as such assistant surveyor, an order in writing to clear the said footpath by removing the said timber," &c., "and to dispose of and apply the proceeds as by the said statute is directed:

"These are therefore in her majesty's name to authorize and require you the said H. Y., as such assistant surveyor, forthwith to clear the said public footpath by removing the said timber and wood and other matters and things as aforesaid, and to sell and dispose of the same, and to apply the proceeds arising therefrom towards the repair of the highways within the said parish of Enfield in the said county.

"Given under our hands and seals this 28th day of June, 1842.

"E. J. Williams. E. Williams."

and it was held that the entry so made by them as judges of record was conclusive. The order here is not entitled to the same weight, but may rather be compared to the order in *Welch v. Nash*, 8 East, 394, which was held not conclusive, the court saying that the magistrates could not make facts to give themselves jurisdiction. The distinction between a mere order and a conviction is pointed out in the observations made upon *Welch v. Nash*, 8 East, 394, by BURROUGH, J., in *Brittain v. Kinnaird*, 1

B. & B. 441, and BAYLEY, J., \*in *Gray v. Cookson*, 16 East, 13,  
 \*474] 23. [COLEBRIDGE, J. The justices here had jurisdiction to inquire

whether the ground was a highway or not; and, if they had, the conclusion they came to in the exercise of that jurisdiction cannot be questioned.]

In *Weaver v. Price*, 3 B. & Ad. 409, justices issued a distress warrant for a poor rate, reciting that W., an occupier of land in the parish of Overton, was rated, &c., and, on demand, had refused to pay; and the justices were held liable in an action of trespass because it appeared on the trial that W. did not occupy any land in Overton. In *Fernley v. Worthington*, 1 Man. & G. 491, where the mayor of a borough had issued a warrant of distress to levy a borough rate imposed upon a township in respect of a portion of it which was within the borough, the rest being without, the Court of Common Pleas held the assessment improper, and that trespass lay against the justice who issued the warrant; yet, before doing so, he must have exercised a judgment upon the facts which were said to render the warrant illegal. Where an order of justices, requiring the stewards of a benefit society to readmit a member, recited that it appeared to the justices that the rules had been allowed and confirmed at sessions, this court held that, on indictment for disobeying the order, such recital was not evidence of the proceedings at sessions; *Rex v. Gilkes*, 8 B. & C. 439, If the magistrates in a case like the present were to plead specially, and they alleged a conviction, that would be a judgment, and the conviction, if produced on the trial, conclusive; but, if they merely stated that certain land was part of a highway, and that the timber was placed upon it, and thereupon they issued their order, *Weaver v. Price*, 3 B. & Ad. 409,

\*475] and *Fernley v. Worthington*, 1 Man. & G. 491, \*show that the defendants would fail, unless they proved the ground of such order.  
 Cur. adv. vult.

LORD DENMAN, C. J., in the same term, (January 31st,) delivered the judgment of the court. After stating the principal facts, as at p. 470 ante, his lordship proceeded as follows.

It appeared to us on the trial that there was no difference between this case and *Brittain v. Kinnaird*, 1 B. & B. 423, except that there the magistrates convicted; here they issued a warrant to remove an obstruction. It does not appear to us that this can make any difference in principle. In both cases they are bound to exercise the power confided by the act: the party interested receives notice to attend and disprove all that can entitle them to adopt any measures against him; and their warrant is an

adjudication of every material point. We were, however, rather disposed to doubt whether, as the seventy-third section gives this authority only where the obstruction is laid *on the highway*, the jurisdiction might not be disproved by showing to the jury's satisfaction that the locus in quo was not part of the highway. The same might have been said in *Brittain v. Kinnaird*, 1 B. & B. 423. The power of convicting was given by stat. 2 G. 3, c. 28, s. 5, where the owner of a boat used it in the manner prohibited; and the court held that magistrates committing the plaintiff for having used his *boat* in such a manner were not to be made answerable in trespass by proof submitted to a jury that the plaintiff's boat was not such a one as the act described; but that the finding by the magistrates on their conviction was conclusive against him on that point.

\*We think we ought to throw no doubt on the authority of that case. We were pressed with the case of actions against magistrates who issue warrants of distress for enforcing payment of poor rates, in which they have been held liable to an action for damages if the rate itself be invalid. This case is clearly distinguishable. A rate, indeed, good on its face, and free from any such defect as makes it wholly void, is a necessary part of the foundation of the jurisdiction; but with the formation of that rate the magistrates have nothing to do; nor does its validity ever come in judgment before them; that is a mere fact as to which they institute no inquiry and come to no judicial conclusion: their warrant of distress, therefore, cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate may depend: nor in its terms does it affect to be. For example, occupation within the parish for which the rate is made is necessary to its validity as against the individual; but the inquiring into that would be extrajudicial by the magistrates; and therefore, when the party brings that matter before them in answer to the application for the warrant, this court has usually declined to compel them by mandamus to issue their warrant, which it never would have done if the magistrates had the right; for then it would have been their duty to examine into, judicially, and decide on, that fact. The principle therefore on which convictions are conclusive evidence of the facts stated in them, necessary to their validity, does not apply.

In this case there can be no rule.

Rule refused.

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\*The QUEEN, on behalf of the Town Council of the Borough of STAMFORD v. WILLIAM THOMPSON. [\*477]

Under stat. 5 & 6 W. 4, c. 76, s. 82, the council of a borough cannot make an order that the treasurer shall pay costs of defending borough constables on a prosecution incurred by them in the discharge of their duty. Such order must be made by the watch committee, with the approbation of the council.

Such an order, by the council, was quashed on certiorari, although the watch committee had, while the prosecution was depending, made a report to the council recommending that the constables should be exonerated, as far as was authorized by law

from all expenses necessarily incurred by them in the execution of their duty, which report the council adopted.

And although, before the certiorari was moved for, the treasurer had paid the costs in obedience to a direction in proper form given on behalf of the council.

THE proceedings in this case, down to the granting of a certiorari, (Trinity term, May 31st, 1843,) are reported as *Regina v. The Town Council of Stamford*, 4 Q. B. 900.(a)

The council, in obedience to the certiorari, returned their order of May 11th, 1841, which was as follows. "At a quarterly meeting of the council," &c., "held," &c., "and at which were present," &c. "Received a report from the watch committee, dated the 27th day of April, 1841, which, upon the motion," &c., "seconded," &c., "is received and adopted: and it is resolved that the several policemen should, so far as is authorized by law, be protected and exonerated from all expenses necessarily incurred by them in the performance of their duties."

Also a resolution of the council, May 3d, 1842, "That the whole of the expenses, as taxed by the crown officer, incurred in the prosecution of Mitchell and Blades, up to the return of the verdict of guilty at Lincoln, excepting the charges for a special retainer" (of counsel in support of the conviction of Cook,) "be paid by the council; and that all other charges incurred \*478] "subsequent to the trial at Lincoln should be disallowed." And

a further resolution of the council, May 31st, 1842, ordering that the last mentioned resolution, from the words "and that all other charges," should be rescinded, and the following addition made, to follow immediately after the words "to be paid by the council;" namely, "as also as all other charges as taxed, incurred subsequent to the return of the verdict at Lincoln, and up to the time of the judgment being pronounced in the Court of Queen's Bench, *Regina v. Mitchell*, 2 Q. B. 636, in favour of the defendants. And that the sum of 197*l.* 19*s.* 3*d.* be accordingly paid to Mr. Atter in discharge of the whole of his bills."

Also an order of the mayor and two members of the council, stat. 5 & 6 W. 4, c. 76, s. 59, (May 31st, 1842,) countersigned by the town clerk and directed to the borough treasurer, authorizing and requiring him to pay to Mr. James Atter 197*l.* 19*s.* 3*d.*, in discharge of the whole of his bills. And Mr. Atter's receipt, of the same date, for that sum.

In last Michaelmas term, a rule was obtained calling on the prosecutors to show cause why the order or resolution of council made on May 31st, 1842, should not be quashed, with costs.

*Whitehurst* now showed cause. The constables, who are appointed for the borough pursuant to stat. 5 & 6 W. 4, c. 76, s. 76, and are under the control of the corporation, ought to be protected at the expense of the borough. In an equitable view these orders are right: and the power of bringing up orders by certiorari under stat. 7 W. 4, & 1 Vict. c. 78, s. 44

(a) Note (a) to *Regina v. The Council of Litchfield*, the words "order for payment quashed on certiorari," at the end of the marginal note to *Regina v. The Town Council of Stamford*, should be omitted.

was introduced, not to encourage minute and technical objections, but to provide that, substantially, the borough fund should not be misapplied. No real misapplication is complained of: the objection [\*479] is only that the order has been made under sect. 92 of stat. 5 & 6 W. 4, c. 76, instead of sect. 82. By the last mentioned section, the treasurer of the borough shall pay to the constables their wages, extraordinary expenses in apprehending offenders, rewards, compensations, and "all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this act. But if the watch committee may direct these payments it does not follow that no such direction shall be good unless given by them. [COLERIDGE, J., According to your view, the town council might make such an order, though the watch committee were unanimously against it.] In the present case the opinion of the watch committee was expressed in favour of such an order. [WIGHTMAN, J., You argue that the town council might make the order with the approbation of the watch committee, instead of the committee making it "subject to the approbation of the council."] It may be questioned whether the costs paid under the order of May 31st are "charges and expenses" which the watch committee may direct to be paid under sect. 82. But, if they are, the committee, in so directing, are only the agents of the town council. The general authority intrusted to the council by sect. 92, as to the disposal of the borough fund, is not controlled by sect. 82. Indeed it would seem that, in the capacity given to them by sect. 6, they had a power over the borough fund, for the purposes of sect. 92, unrestrained except by the provisions of stat. 7 W. 4, & 1 Vict. c. 78. In *Regina v. The Mayor &c. of Bridgewater*, 10 A. & E. 281, and *Regina v. Paramore*, 10 A. & E. 286, it was held that a town council could not order the costs of defending and opposing rules nisi to be paid out of the borough fund; but the reason was that the purposes of such defence and opposition were not public. Here the purposes clearly were so. In *Regina v. The Council of Lichfield*, 4 Q. B. 893, the objection to the payment of law expenses out of the borough fund by order of the council was that the council had not previously authorized the incurring of those expenses. Had that been done, it appears by the judgments of the court that the order would have been upheld. If this rule were made absolute, it is difficult to say who would be liable for the money which has been paid over. The treasurer would not, for he paid it in obedience to an order regularly signed. [\*480]

*A. J. Stephens*, contra. This case must be decided by the express words of stat. 5 & 6 W. 4, c. 76, s. 82; "and all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this act." The court, in the former stage of this case, (a) expressed a strong

(a) *Regina v. Town Council of Stamford*, 4 Q. B. note (a) to *Regina v. The Council of Lichfield*.

opinion against the order now in question. The case has been argued as if the watch committee had made some order which the council had carried into effect; but none such was really made. (He was then stopped by the court.)

\*481] \*Lord DENMAN, C. J. We are bound to set aside this order. Sect. 92 of stat. 5 & 6 W. 4, c. 76, gives large powers to the council; but that cannot interfere with the definition of particular powers vested in a distinct body under sect. 82. It is admitted, and it is the reason on which we act, that, under the last clause of sect. 82, the watch committee might, with the approbation of the council, have ordered payment of these costs; if they might have done so, it was not for the council to do it. This was treated in argument as a technical objection: but it is important in practice that the several bodies within a corporation should ascertain the responsibility which lies on each, and act respectively upon that. A difficulty was suggested as to the recovery of the sum which has been paid over; but we are not bound to say what is to become of that money. We have no choice but to set aside the order.

As to costs of the present application, we cannot help seeing, on the whole view of the case, that this is merely the mistake of a public body: and we think that costs ought not to be imposed.

PATTESON, J. I am of the same opinion. I am far from saying that the watch committee might not have ordered payment of these expenses under sect. 82; but they have not done it.

COLERIDGE, J. Sect. 82 is drawn with great care to keep the several authorities distinct. The constables act under the orders of the justices as well as of the watch committee. Their salaries are to be such as the committee shall direct, subject to the approbation of the council. Then, as \*482] to extraordinary expenses incurred \*by the constables in apprehending offenders and executing the orders of any justice having jurisdiction within the borough, the discretion of the council is put aside, and the council is directed to order, as it were ministerially, the payment of such expenses as have "been first examined and approved by such justice." Thirdly, the watch committee is put forward again, and it is enacted that the borough treasurer shall pay such further sums as the committee shall, subject to the approbation of the council, award to any of the constables for extraordinary exertion, or for wounds, or as an allowance for disability by reason of bodily injury or length of service, and "all other charges and expenses" which the committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force. Now, if the payments and allowances of this third class were to be such as the council, and not the watch committee, might award, the committee (who are no definite body, and may, under sect. 76, be a very small number in proportion to the council) might all be opposed to the grant, and yet the council make an order for the payment. It is important in these cases to keep the responsibility with those on whom the

legislature has placed it, and to take care that power shall not be exercised by others, perhaps in defiance of them.

WIGHTMAN, J. Sect. 92, which was cited in opposition to the rule, gives no direct power to make any order like that in question, but only designates the purposes to which the borough fund shall be applied. Then sect. 82 is more precise: and it seems, under that clause, that the payment of such expenses as are \*mentioned in the present order (if they are to be allowed at all, which I assume) should be directed by the watch committee in the first instance, with the approbation of the council; because, as my brother COLERIDGE has pointed out, the constables are under the direction of the watch committee; and, if the order required by sect. 82 were departed from, the council might direct payment of the expenses against the wish of the committee. [\*483]

Rule absolute, without costs.

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**The QUEEN v. The Inhabitants of PERRANZABULOE.**

Reported, 3 Q. B. 400.

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**\*The QUEEN v. The Inhabitants of CUMBERWORTH HALF. [\*484]**

The examination of a pauper stated that, when fourteen years old, he \*was put out an apprentice by covenant indenture" to A. B. for seven years, and went to and resided with him in C. under the indenture for five years, when pauper's brother purchased his time out, and the indenture was destroyed.

*Held*, that for the case of a common binding, this statement was sufficiently particular and that it was not to be inferred from the language used that the binding might have been by a parish.

The notice of grounds of appeal stated that the pauper, in 1812, "rented and occupied" a "tenement" in D., consisting of the keeping or feeding of a cow, of which he was the owner, by and on the land and premises of J. H." for one whole year, and which was of the value of 10*l.* a year at least, and for which he paid J. H. 4*s.* a week during the whole year.

*Held*, that the pauper did not appear by this statement to have enjoyed such an interest in the profit of land as entitled him to a settlement in D.

On appeal against an order of justices removing William Burdett and his wife from the township of Denby in the west riding of Yorkshire to the parish, township or place of Cumberworth Half in the same riding, the sessions confirmed the order, subject to the opinion of this court on the following case.

The examination respecting the settlement of the said William Burdett and Sarah his wife, whereon the said order was made, was the following. "This examinant, William Burdett, maketh oath, and saith that he is sixty-nine years of age, and the place of his settlement is at Cumberworth Half in the said riding, which he gained by apprenticeship with Amos

Burdett of Gilsits in Cumberworth Half aforesaid. When I was about fourteen years of age, I was put out an apprentice by covenant indenture to the said Amos Burdett for the term of seven years, to learn the trade of a clothier; and I went to and resided with the said Amos Burdett in Cumberworth Half under the said indenture for five years and six months, when my brother Joseph Morton purchased my time out with my master for the sum of two guineas, which was paid by my mother, and the indentures were destroyed; and I have never done any act since whereby to

\*485] gain a settlement. I was married at \*Louth in Lincolnshire to my wife, Sarah Roberts, in the year 1795." On the hearing of the appeal, as soon as the respondents had opened their case, the appellants objected that the said examination was insufficient on the face of it, and that the said order of removal ought on that ground to be quashed. The grounds of insufficiency relied on, under grounds of appeal which properly pointed them out, were, that the alleged indenture of apprenticeship was neither shown to have been produced before the justices who took the said examination, nor was its loss or destruction sufficiently shown to let in secondary evidence before the said justices of such indenture; and that, if a sufficient foundation were laid in the said examination to warrant the reception of such secondary evidence, then the secondary evidence given respecting the said indenture was wholly defective and insufficient in the following respects, that is to say: That it did not appear by the said examination whether the said William Burdett was a parish apprentice, or by whom he was bound, or who were the parties to the supposed indenture: and that, if he were a parish apprentice, then it did not appear by the said examination whether the said binding was allowed by two justices of the peace; and that it did not appear by the said examination either that the money given or contracted for, in relation to such apprentice, was inserted in the said indenture, or that the said indenture was duly stamped in pursuance of the statutes in force at the time when it was executed. The Court of Quarter Sessions, after hearing counsel on both sides upon the alleged insufficiency of the said examination, overruled the objections taken, and held the said examination good. The appellants, \*486] after such decision of the court, conceded that \*the respondents could prove the settlement stated in the examination; and that settlement was taken as proved.

The appellants then proposed to rely on a subsequently acquired settlement, as stated in the following, which was the seventh, ground of appeal. "That, subsequent to the said alleged apprenticeship in our said township of Cumberworth Half, that is to say in or about the year 1812, the said William Burdett, the pauper, rented a cottage or tenement of the value and for the sum (which he paid) of 1*l.* 10*s.* per annum, situate at Exley Gate in your said township of Denby, in which he resided for the term of one whole year at the least; and the said pauper has ever since continued to reside, and does in fact now reside, in the same cottage at

**Exley Gate** aforesaid: and that, in or about the year aforesaid, and at the same time that he so occupied and resided in the said cottage or tenement at **Exley Gate** aforesaid, he also rented and occupied another tenement at **Denby Hall** in your said township of **Denby**, consisting of the keeping or feeding of a cow, of which he was the owner, by and on the land and premises of **James Haigh** of **Denby Hall** aforesaid, for the space of one whole year, and which was of the value of 10*l.* a year at the least, and for which the said pauper paid to the said **James Haigh** the sum of 4*s.* a week during the whole year; whereby the said pauper did acquire a settlement, and is now legally settled, in your said township of **Denby**. The respondents upon this admitted that the facts stated in the said seventh ground of appeal were all true; and it was agreed by the counsel on both sides that evidence sufficient to establish the said seventh ground of appeal should be taken as having been adduced by the appellants; but the counsel for the respondents \*objected that the said seventh ground of appeal did not show upon the face of it a legal settlement in the said township of **Denby**. After hearing this question argued, the Court of Quarter Sessions decided that the said seventh ground of appeal did not show upon the face of it a legal settlement in the said township, and thereupon confirmed the said order of removal, subject to the opinion of the Court of Queen's Bench. [\*487]

If this court should be of opinion either that the said examination was bad as contended by the counsel for the appellants, or that the said seventh ground of appeal did show a legal settlement in **Denby**, then the said order of removal and the said order of sessions were to be quashed; otherwise the said order of sessions and the said order of removal to stand confirmed.

**Sir G. A. Lewin** and **Overend**, in support of the order of sessions.(a) As to the first point: there is no ground for assuming that the indenture in this case was a parish indenture. *Primâ facie* it will be taken that an apprentice was bound in the ordinary manner. There is a distinction, universally understood at sessions, between "a covenant indenture" and a parish indenture. And stat. 43 Eliz. c. 2, s. 5, which provides for the binding of parish apprentices, points out that distinction, by the enactment that such binding shall be "as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or her self." The examination, stating that "the \*indentures were destroyed," showed enough to let in secondary evidence of them. It could not be necessary for the pauper to state that he was present at the destruction. [Lord DENMAN, C. J. It is sufficiently shown.] [\*488]

Then as to the subsequent settlement. The pasturage of a cow would have been a tenement in respect of which a settlement might be acquired,

(a) The case was partly argued in Michaelmas term, (November 11th,) 1843, before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js., when the court desired, in the first instance, to hear counsel on each side on the question respecting the indenture. This having been argued, the case stood over to the present term.

if it had been a necessary part of the contract that the cow should be pastured upon Haigh's land; but not otherwise; *Rex v. Tisbury*, 2 Nol. P. L. 19, note (1,) 4th ed.; *Rex v. Minster*, 3 M. & S. 276; *Rex v. Sutton St. Edmunds*, 1 B. & C. 536; *Rex v. Bardwell*, 2 B. & C. 161. Here the ground of appeal states only that the pauper rented and occupied a tenement at Denby Hall, "consisting of the keeping or feeding of a cow, of which he was the owner, by and on the land and premises of James Haigh of Denby Hall aforesaid, for the space of one whole year," for which he paid Haigh 4s. a week. The words "feeding" "by and on the land and premises of J. H." "for the space of one whole year" cannot mean that she was to be pasture fed at all times of the year; and, far from necessarily implying that the cow was to be pastured on the land, they admit of several constructions widely different. If their known import was that the cow should be pastured on Haigh's land, the sessions (as BAYLEY, J. observed, when discussing a similar question in *Rex v. Thornham*, 6 B. & C. 733,) should have stated in the case that they so understood it: but they have stated, in substance, the contrary. To put the test applied in *Rex v. Stoke \*upon Trent*, 10 East, 496, and *Rex \*489] v. Darley Abbey*, 14 East, 280, could the pauper have sued Haigh in trespass for removing the cow from any particular pasture, or for breach of contract in feeding her otherwise than by the pasturage? If there is even doubt on this point, the ground of appeal is too ambiguously stated, and it cannot be helped by intendment; *Regina v. The Justices of the West Riding*, 2 Q. B. 505; *Regina v. Old Stratford*, 2 Q. B. 513; *Regina v. The Recorder of Leeds*, 2 Q. B. 547, (note.)

*R. Hall and Pashley*, contra. As to the apprenticeship. The construction given on the other side to the words "covenant indenture" is not universally known. Every binding of an apprentice involves covenants, express or implied. "I was put out an apprentice" imports that the pauper did not bind himself, and favours the supposition of a parish binding. The examination ought to state distinctly the species of apprenticeship relied upon, as the course of inquiry in the case of a common apprenticeship would be different from that in the case of a parish binding. The term "covenant indenture" is at best ambiguous, and, therefore, makes the examination insufficient.(a)

As to the settlement in Denby. The notice of grounds alleges that the pauper rented and occupied "another tenement," "consisting," &c. The word "tenement," so used, explains that the feeding afterwards described was such as the law considers a tenement, and not something different.

\*490] That answers the \*objection founded on *Regina v. The Justices of the West Riding*, 2 Q. B. 505, and the other cases on the subject of uncertainty. And the description itself is sufficiently clear. To keep the cow on hay severed in a former year, or from other land than

(a) Sir G. A. Lewin here referred to *Rex v. St. Michael's Bath*, 2 Bott, 482, pl. 601 6th ed.

Haigh's, would not have been a fulfilment of his contract to feed "by and on the land." [WIGHTMAN, J. Was the feeding to be by the land, or by Haigh?] "By" refers naturally to the land as the nearer word. [COLERIDGE, J. Keeping or feeding "by the land" is not a common expression. WIGHTMAN, J. And you must say "by the premises," as well as "by the land."] "Premises" is a term having various meanings. The sense here is, that the cow was to be fed by the land, and on the land and premises. The words "on the land" fix a place upon which the feeding is to be, and bring the case within the authority of *Rex v. Minster*, 3 M. & S. 276, and *Rex v. Darley Abbey*, 14 East, 280.

LORD DENMAN, C. J. We had some doubt in this case whether the examination was good; but I think the words "covenant indenture" are sufficiently descriptive to enable us to say that the justices came to a right conclusion. Then, as to the notice of appeal, I think the seventh ground was insufficient, not as giving a defective account of the case to be set up, but as showing that which in point of law is not a tenement. It is established by *Rex v. Tisbury*, 2 Nol. P. L. 19; and see *ibid*, note (1,) and other cases, that a tenement of this description can be created only by an engagement for the feeding of cattle on the produce of some particular land which is to confer a settlement. It seems to me that the only reasonable construction of this \*agreement is, that the cow was to be kept or fed by Haigh, and on his land and premises. But, even if there were a doubt as to this, the statement is insufficient. [\*491]

PATTESON, J. I was not present at the argument on the first point; but I agree in what my lord has said upon it. The examination shows that the indenture is lost, and, by describing it as a "covenant indenture," distinguishes it sufficiently from a parish indenture. As to the second point, on the construction argued for by the appellants we must infer from the word "by" that the cow was to be fed upon the land during the whole year. I think we must say, *reddendo singula singulis*, that the feeding was to be "on" the land while there was food on it, and by Haigh at other times. In *Rex v. Oswald Twissell*, (a) the pauper rented the milk of a cow, to be kept by the owner, but was held to have acquired no settlement, because it was not made part of the bargain that she should be pasture fed, though she was so in fact; and it was on the distinction furnished by that case that ABBOTT, C. J., founded his judgment in *Rex v. Sutton St. Edmunds*, 1 B. & C. 536, where *Rex v. Oswald Twissell* (a) was cited. I thought at one time that the appellants here might set up as a tenement the right, so far as the contract gave it them, to depasture on the growing produce of the land during some part of the year, and might allege that this, exclusively, was worth 10*l.* a year: but that could not well be, because the payment for the whole year's feeding was only 10*l.* 8*s.*

\*COLERIDGE, J. On the first point it is natural that we should look to stat. 43 Eliz. c. 2, s. 5, considering that parish indentures

[\*492]

(a) Cited, 1 B. & C. 538, in *Rex v. Sutton St. Edmunds*.

came in by that act: and we there find it enacted that the binding of a child by the overseers shall be "as effectual to all purposes, as if such child" "by indenture of covenant bound him or her self:" it is therefore reasonable to suppose that a "covenant indenture" means something different from a parish indenture. And there is nothing in the statements of the case to show that any justice of the peace interfered either in the binding or in putting an end to the apprenticeship. As to the other point, I think the case, read with common sense, can bear only the construction that the cow was to be fed and kept by Haigh on his land and premises. The allegation that the supposed tenement was "occupied" by the pauper does not make it more a tenement. Reliance has been placed upon that word, as used in the case; but its operation is confined by the statement which follows.

WIGHTMAN, J. I am of the same opinion on both points. As to the second, the word "tenement" is explained by what follows. It was not necessary that the cow should be pasture fed; and she might be fed, entirely or in part, with the produce of other land than that in respect of which the settlement is claimed. Order of sessions confirmed.

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## \*The QUEEN v. SCOTTON.

Under stat. 6 & 7 W. 4, c. 65, s. 9, an information under the Game Act, 1 & 2 W. 4, c. 32, if laid by a person not deposing on oath to the matter of charge, must distinctly show that the charge was deposed to by some other credible witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction: and, if the defendant is summoned and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury.

*Quære* whether, under stat. 9 G. 4, c. 69, s. 9, or 1 & 2 W. 4, c. 32, s. 30, a party can be convicted of entering or being upon land for the purpose of poaching, if he does not himself go upon the land, but is on an adjacent close, employing, assisting, and in company with, those who actually enter.

INDICTMENT for perjury on the hearing of an information before two justices under stat. 1 & 2 W. 4, c. 32, s. 30. Plea, not guilty.

On the trial of the indictment, before WILLIAMS, J., at the Staffordshire Summer assizes, 1843, it appeared that the following information was laid under the above section, and in pursuance of stats. 1 & 2 W. 4, c. 32, s. 41, and 6 & 7 W. 4, c. 65, s. 9.

"Staffordshire to wit. Be it remembered that, within three calendar months after the commission of the offence hereinafter named, to wit on 13th day of January, A. D., 1843, at Rolleston in the said county, Sir Oswald Mosley, of," &c., "baronet, a credible witness, in his proper person cometh before me William Fawkener Chetwynd, one of the justices," &c., "assigned," &c., "in and for the said county," &c., "and now here giveth me the said justice to understand and be informed that Richard Robinson, of," &c., "did, on," &c., "at," &c., "unlawfully commit a

certain trespass by entering in the daytime of the same day upon a certain close of land in the possession and occupation of Thomas Warren, there situate, in pursuit of game, contrary to the statute in such case," &c.; "whereby, and by force of the statute, the said Richard Robinson has forfeited a sum of money not exceeding 2*l.*, to be applied as the said statute directs. And, the said information having been also verified upon \*the oath of William Atkinson, of," &c., "gardener, another credible witness, before me the said justice, so hereupon the said Sir Oswald Mosley prays that the said Richard Robinson may be forthwith summoned to appear before one of the said justices to answer the said information and make his defence thereto. [\*494

"Exhibited by Sir Oswald Mosley, and sworn before me on the day and year first above written.

"W. F. Chetwynd."

"Oswald Mosley.

"William Atkinson."

A summons was granted; and the defendant appeared before two justices, and pleaded not guilty. Atkinson was sworn, and stated that, on January 11th, 1843, he saw Robinson in Warren's field, under circumstances (described by the witness) which showed an offence within stat. 1 & 2 W. 4, c. 32, s. 30. The defendant was also sworn, and deposed that he went with Robinson into a lane near the field; that Robinson shot into the field, but did not enter it; and that defendant himself went into the field, and fetched off what Robinson killed. This was the evidence on which perjury was assigned.

The information being produced on the trial of the indictment, the defendant's counsel objected that it did not show any charge made on oath, and therefore that the subsequent proceeding of the justices was without jurisdiction. WILLIAMS, J., gave leave to move, if necessary, that a verdict might be entered for the defendant on this point. It was also contended that the evidence given by the defendant was not material to the result of the information, because Robinson was equally guilty of an offence against stat. 1 & 2 W. 4, c. 32, s. 30, whether \*he went [\*495 into the field and shot there, or whether he shot into the field from a place adjoining, and another person, in his company, went in and brought away the game. The learned judge thought the evidence material, and overruled this objection. Verdict, guilty.

*Talfourd*, Serjt, in Michaelmas term, 1843, obtained a rule to show cause why a verdict should not be entered for the defendant on the first objection, or a new trial granted on the second; or why the judgment should not be arrested, on grounds which it is unnecessary to state.

Sir *F. Pollock*, attorney-general, *Whateley* and *Greaves* now showed cause. It is objected that, on the face of this information, the charge does not appear to have been deposed to on oath, either by Sir Oswald Mosley, the prosecutor, or by any other credible witness. Nothing in stat. 1 & 2

W. 4, c. 32, s. 41, or stat. 6 & 7 W. 4, c. 65, s. 9, requires an information expressing on the face of it that a particular charge is made on oath; or, indeed, any written information at all. If the magistrate had proceeded *ex parte* for want of appearance, or had issued his warrant to arrest, it might reasonably have been insisted that a previous charge on oath must be distinctly shown: but, when the party charged has been summoned and appeared, and made his defence to the information, it is too late to urge that it did not state a verification of the charge following the precise language of the statutes. The case is analogous to those in which it has been held that an irregular summons, or the want of a summons, was cured by the party's appearance; Paley on Conv. 39, ch. 2, s. 4, (3d ed.,) and *Rex* \*496] *v. Johnson*, 1 Stra. 261; *Regina v. Barret*, 1 Salk, 383, and other cases, there cited. And, where the question is whether perjury was committed on a trial, the court will not look into a defect in the preliminary proceedings: *Regina v. Meek*, 9 Car. & P. 513, is, in principle, an authority on this point. A question resembling the present arose, but was not decided, in *Atkins v. Kilby*, 11 A. & E. 777.

The counsel for the crown also contended that the evidence of Scotton was material. First, because, at all events it impeached the testimony, and shook the credit, of Atkinson. Secondly, because, as they argued, it was necessary to a conviction under stat. 1 & 2 W. 4, c. 32, s. 30, that the defendant should have entered and been personally upon the land. *Rex v. Dowsell*, 6 Car. & P. 398; *Rex v. Passey*, 7 Car. & P. 282; *Rex v. Lockett*, 7 Car. & P. 300, and *Regina v. Nickless*, 8 Car. & P. 757, (a) were referred to (b.) This point not being decided, though alluded to in the judgments \*497] pronounced by the court, no further report of the argument is thought necessary. The argument on other points, not decided by the court, is also omitted.

(a) See also *Rex v. Andrews*, 2 M. & Rob. 37, and 1 Russ. on Crimes, 476, 3d ed., by Greaves, note (b) by the editor. The indictments in all the above cases were for night poaching, under stat. 9 G. 4, c. 69.

(b) The following observations upon the cases were made by the court during the argument.

Lord Denman, C. J. In *Rex v. Passey*, (7 C. & P. 282,) and *Rex v. Lockett*, (7 C. & P. 300,) Alderson, B., held that, if some defendants were in the wood where the trespass was committed, and others were on the outside, but were of the same party, and engaged in the same purpose, all were guilty of an offence under stat. 9 G. 4, c. 69. It does not appear in the first case whether the jury found that all had entered upon the land or not. In the other case they expressly found that all had entered. My brother Patteson, in *Rex v. Dowsell*, (6 C. & P. 398,) expressly lays it down that, in the case of night poaching, the parties "must be all proved to be in the place laid in the indictment." Patteson, J. The offence there, under stat. 9 G. 4, c. 69, s. 9, was entering and being on land to the number of three or more together, for the purpose, &c. It was unnecessary for me to go so far as I did in that case; for there was no sufficient evidence that one party was assisting the other in taking or destroying game; all joined in a rescue; but the person who was previously engaged in shooting was alone at that time, and there was nothing to warrant the jury in saying that the others helped him. Lord Denman, C. J. If *Rex v. Passey*, (7 C. & P. 282,) was a case similar in its circumstances to *Rex v. Lockett*, (7 C. & P. 300,) all the cases may perhaps be reconciled; for in *Rex v. Lockett*

*Talfourd*, Serjt. (with whom were *M. D. Hill* and *J. Gray*,) *contra*. A valid information, here, was necessary to give the justices jurisdiction. therefore *Regina v. Meek*, 9 Car. & P. 513, (where the alleged perjury was committed on the trial of a bad indictment at the assizes, and this was held no objection) does not apply. By stat. 6 & 7 W. 4, c. 65, s. 9, an information on oath by some credible witness is made a condition precedent to the summoning any party accused. The words "and the said information having been also verified upon the oath of William Atkinson" do not show that Atkinson swore to the subject matter of the charge. They may mean only that he attested the statement of Sir Oswald Mosley, before referred to. The words "sworn before me" give no additional certainty: two persons are mentioned before as credible witnesses; and the swearing may have been by either. (He was then stopped by the court.)

\*Lord DENMAN, C. J. I think it is a fatal objection that Robinson does not appear to have been summoned before the justices on any information authorizing them so to call upon him. The information does not show such a deposition on oath as the act 6 & 7 W. 4, c. 65, s. 9, requires; for it would be an unreasonable construction of that instrument to say that Atkinson deposed to the facts mentioned as the substance of the charge, and which ought to have been stated as part of his deposition. We do not yield to the objections as to the materiality of what was sworn, nor do we say whether stat. 1 & 2 W. 4, c. 32, s. 30, is governed, in its application, by the same rules as stat. 9 G. 4, c. 69, s. 9. The questions on these points are still open. [\*498]

PATTESON, J. The case of *Rex v. Dowsell*, 6 Car. & P. 398, decided before me under stat. 9 G. 4, c. 69, s. 9, might perhaps be found, on examination, to differ from those before my brother ALDERSON which have been referred to. We are not bound to say, in the present case, whether it be necessary to a conviction of any defendant under that enactment, or under stat. 1 & 2 W. 4, c. 32, s. 30, that he should personally have gone into the close, or whether it may be sufficient that he, standing without, sent others in. The present question arises on stat. 6 & 7 W. 4, c. 65, s. 9: and by that clause it is necessary, before any step be taken to carry into effect such an information as is there spoken of, by summons or otherwise, that the informer or some other person should have made a deposition on oath, pledging himself to the truth of the charge, and signing his name. \*From the manner in which Atkinson's name is placed in the body of this information, it does not show a distinct deposition to the charge by him, even when his name is subscribed. If Atkinson were [\*499]

the jury thought that all the parties were upon the land when the offence was committed. In that case *Rex v. Dowsell*, (6 C. & P. 398,) was cited; and my brother Alderson said that, out of respect for the opinion there expressed, he would, if it should become necessary, reserve the point: but the necessity did not arise. It seems, therefore, that no one has yet suffered punishment on the construction given to the statute in *Rex v. Parsey* and *Rex v. Lockett*.

indicted for perjury committed by him as a witness in support of this information, the instrument, as drawn, would not bear out an indictment. The language, in every material part, is that of Sir Oswald Mosley.

WILLIAMS, J. The statute 6 & 7 W. 4, c. 65, s. 9, prescribes what is to be done to give the magistrates jurisdiction when the informer himself does not make the charge on oath. The meaning of all written informations is to show that the matter of complaint was one which the justices had authority to inquire into. Here we find nothing which amounts to a statement of the charge before the summoning justice on the oath of the informer or another witness. All the language of the information might be borne out if no statement of the charge had been made beyond that of Sir Oswald Mosley.

COLERIDGE, J. I agree that this question turns wholly on stat. 6 & 7 W. 4, c. 65, s. 9. In the case of an information under the circumstances there pointed out, it is a condition precedent to any further step that the matter of the information should be deposed to on the oath of the informer or some other credible witness. Here that does not appear. I should rather infer the contrary.

Rule absolute, to enter a verdict for the defendant.

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\*500] \*The QUEEN v. The Inhabitants of WESTBURY.

Under stat. 4 & 5 W. 4, c. 76, s. 79, notice of chargeability must proceed from a majority of the parish officers, or three guardians at least, of the removing parish. Whether the notice, on the face of it, must show, by the signatures of the parties or otherwise, that it does proceed from such a majority, &c., *quære*.

ON appeal against an order of two justices, whereby Rachel Harman and her female bastard child were removed from the parish of Trowbridge to the parish of Westbury, both in Wiltshire, the sessions confirmed the order subject to the opinion of this court on a case.

The case (besides statements not material to the point upon which the decision of the court turned) set out a certificate of chargeability, from the guardians of the Melksham union, in which Trowbridge is, "duly signed, sealed and countersigned as required by the statute 5 & 6 Vict. c. 57, s. 17," and a notice of chargeability. The latter commenced as follows. "In the matter of Rachel Harman (widow of Thomas Harman,) a pauper to the overseers of the parish of Westbury in the county of Wills: Take notice, that the above named Rachel Harman," &c. The conclusion was as follows. "Dated this 8th day of April, 1843. George Mundy, Robert Walker, James Brewer, overseers of the parish of Trowbridge in the county of Wilts." It did not appear by any thing in the notice, except as above, from whom the notice proceeded.

The sixth ground of objection was the following. "That no legal or sufficient notice has been given, by the said respondents to the said appel-

lants, that the said pauper and her said child were, at the time of making such order, actually chargeable to the said parish of Trowbridge." The case then stated as follows.

On the hearing of the appeal, the service of a notice \*of appeal and grounds were duly proved: and the counsel for the respondents, to meet the sixth ground of appeal above stated, called a clerk in the office of the respondent's attorney, who proved a due service of the notice of chargeability hereinbefore set forth, and that the notice so served was signed by George Mundy, Robert Walker, and James Brewer, three of the overseers of the respondent parish. On his cross examination he stated that there were in fact four overseers and two churchwardens, appointed yearly, in the respondent parish. (The case then stated the names of the six, including the three above mentioned.) Upon this evidence being given, and before any further statement was made, an objection was taken by the counsel for the appellants, that the notice of chargeability was bad and defective, inasmuch as it was not signed by the majority of the body of parish officers, the number being six, whereas the notice was signed by three only: and it was urged that the court ought to quash the order on account of the insufficiency of the said notice. The sessions overruled the objection, and held that the notice was sufficient. The counsel for the appellants then declined, on account of a technical difficulty, to go farther into the merits; and the order of removal was confirmed. [\*501]

If the court should be of opinion that the notice of chargeability was sufficient, then the order of removal and the order of sessions were to stand confirmed: if otherwise, to be quashed.

*Hodgson*, in support of the order of sessions. (a) The notice of chargeability is sufficient under sect. 79 of stat. 4 & 5 W. 4, c. 76. It is not necessary that a majority of the officers should sign. *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480, will be cited on the other side. There it was decided that, under sect. 73, a notice of application for an order of maintenance must be made by a majority of the aggregate body of overseers and churchwardens. That section requires that the notice shall be given "under the hands of such overseers" &c.: but sect. 79 requires only that the notice shall be sent "by the overseers." Now, though there could not be a notice under the hands of a majority of the officers unless such a majority actually signed, a notice may be sent, on the part of the officers, by any one authorized to act for them. The act of giving notice is merely ministerial: the substantial part of the proceeding is the obtaining of the order. In the present case, the officers of the appellant parish have recognised the authority under which the notice of chargeability was sent, by acting upon it; for they appeal, and so treat all the documents as coming from the respondents. Even if it be necessary that the authority should distinctly appear, by the signatures of a ma- [\*502]

(a) The argument in support of the order of sessions was heard, before the same judges as the rest of the argument, on 20th January, 1844.

jority or otherwise, the objection is not properly raised by the sixth ground of appeal, which does not object to any want of form or authority in the notice, but, in effect, denies the giving of any notice whatever.

*Pashley*, contra. The legislature intended to give the removing parish an opportunity to retract, after obtaining the order, since circumstances might change, as, for instance, if a female pauper married immediately  
 \*503] \*after the removal. And the court has acted in conformity with

this principle, by encouraging, as far as it could, abandonments of orders of removal, as appears from *Regina v. Rishworth*, 2 Q. B. 476, (a) and like cases. This, therefore, is clearly not an act merely ministerial. It is suggested that the notice has been recognised by the appellants, they having acted upon it: but they have acted only by impugning it. Then, as to the principal question. A majority might act for the whole; and the signatures of a majority would suffice; *Rex v. The Justices of Warwickshire*, 6 A. & E. 873; *Rex v. Beeston*, 3 T. & R. 592. (b) But less than a majority cannot represent the whole. *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 780, applies in principle: and in *Rex v. Austrey*, 6 M. & S. 319, it was held that two churchwardens could not seal by a single seal, so as to satisfy stat. 8 & 9 W. 3, c. 30, s. 1, which requires "the hands and seals of the churchwardens and overseers of the poor," "or the major part of them." The notice, therefore, in this case, is bad as not appearing to be given by the majority. [COLERIDGE, J. There is nothing in sect. 79 requiring the hands or seals of the officers to the notice, though a submission to the order by the officers of the other parish must be "by writing under their hands." Could not the officers appoint an attorney?] The notice does not show any such appointment. And, even if it could be assumed that the authority need not appear on the face of the instrument, here the sessions have not found that the three were authorized to act for all. It is a general principle that notice must proceed  
 \*504] from a \*proper party, entitled to enforce the right in question: it is not sufficient that the other party should acquire knowledge of the fact of which notice is to be given; *Furze v. Sharwood*, 2 Q. B. 388, (c) [PATTESON, J. Why is not the certificate of chargeability, given under stat. 5 & 6 Vict. c. 57, s. 17, sufficient?] That section only provides for facilitating proof of chargeability, which was required to appear in the examination; *Regina v. Black Collerton*, 10 A. & E. 679: it does not repeal the statutory provisions as to the notice. The notice must come from the aggrieved party: being aggrieved is still the important requisite, as appears from *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163, where it was held that an appeal may still be brought, under stat. 13 & 14 C. 2, c. 12, s. 2, at the next sessions after the actual removal, however long after the order. (He was then stopped by the court.)

LORD DENMAN, C. J. We are not bound to enter into the question as to

(a) Judgment of Patteson, J.

(b) See *Rex v. Whittaker*, 9 B. & C. 648.

(c) See *Chapman v. Keane*, 3 A. & E. 193.

what must appear on the face of the notice. It certainly is desirable that the notice should show that it proceeds from a majority. But here it appears that in fact three officers only acted, without authority entitling them to represent the majority. The provision of sect. 79 is therefore not complied with: and the objection, having been properly pointed out, ought to have prevailed.

PATTESON, J. The notice must be the act of the majority. There may be some dispute as to the proper way of showing that it is so: but here that is not shown at all.

\*COLERIDGE, J. I quite agree, upon the ground on which my lord and my brother PATTESON put the question; though I also [\*505 agree that we must be understood not to encourage any form which does not show, on the face of it, that the notice proceeds from the majority. In this case there are six officers: if three could give the notice, the other three might abandon; and then a dispute might arise which decision was to prevail. It would manifestly be most advantageous that the signatures of the majority should appear.

WIGHTMAN, J. I am of the same opinion. Sect. 79 provides, in the case of guardians of a parish, that "any three or more" may give the notice. Thus it is only by statute that a valid notice can be given except by or on behalf of the whole: if a notice were given, in any other case than that of guardians, by less than a majority, such notice could not be on behalf of the whole, or the inconvenience which has been pointed out might ensue.

Order of sessions quashed.(u)

(a) See the next three cases. Also, post, *Regina v. Leominster*, p. 640; *Regina v. Bedingham*, p. 653.

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\*The following case was decided in Easter Term, 1844. [\*506

### The QUEEN v. The Justices of SURREY.

Notice of grounds of appeal against an order of removal was signed by W. R., churchwarden, and T. G., overseer: also by W. P. H. "for" W. H., who was a churchwarden: and by J. E., "guardian." The parish had two churchwardens, two overseers, and one guardian, and was part of a union formed under stat. 4 & 5 W. 4, c. 76.

*Held*, that the notice of grounds was insufficient under stat. 4 & 5 W. 4, c. 76, s. 81, for that the signature of W. P. H. for W. H. could not avail, no evidence of authority appearing: and J. E., as guardian of a union, was not guardian of the appellant parish, and therefore was not competent to sign, under sect. 81.

CHARNOCK, in last Michaelmas term, obtained a rule nisi for a mandamus to the justices of Surrey to enter continuances and hear the appeal of the churchwardens and overseers of the parish of Allhallows the Great in the city of London against an order of a police magistrate removing Susannah Legge, widow, and her five children, from the parish of Wimbledon, Surrey, to the said parish of Allhallows the Great.

The appellants had served the respondents with notice of grounds of appeal, reciting that the churchwardens and overseers of Allhallows had already given notice of, and entered and respited to the next sessions, their appeal against the above order; and proceeding as follows. "Now we, the undersigned churchwardens and overseers of the poor of the said parish of Allhallows the Great, do hereby give you notice that it is our intention to bring on our said appeal to be heard and determined at the said next general quarter sessions," &c. And "we do hereby give you further notice that the grounds," &c., (stating the grounds of appeal.) The notice was signed as follows.

<p>" William Ryde. Thomas Gooch.          For Wm. Hammond,          W. P. Hammond.</p>	}	<p>Churchwardens and Overseers of          the poor of the parish of Allhallows          the Great.</p>
<p>John Elsden</p>	-	Guardian."

\*507] \*The affidavit in support of the rule stated as follows: "That there are in the said parish of Allhallows the Great aforesaid two churchwardens, two overseers and one guardian of the poor only;" that "the said William Ryde is one of such churchwardens, the said Thomas Gooch is one of such overseers, and the said John Elsden is such guardian as aforesaid; and" "that, at the time when it became necessary to sign the said notice of grounds of appeal, the said William Hammond, the other of such churchwardens as aforesaid, was absent on business in a distant part of the country, and was on that account unable to sign personally the said notice; and the said James Denton, the other of such overseers as aforesaid, was also absent from his place of business," and his place of residence not known.

It further appeared by the affidavits that, when the appeal came on for hearing at the sessions, the respondents urged as a preliminary objection that the notice of grounds of appeal was insufficient, not having been signed by a majority of the parish officers. Counsel were heard on the objection, and also on the question whether it had not been waived in the course of a correspondence between the attorneys of the appellant and respondent parishes on the subject of admissions. The sessions thought the objection not waived; and they declined to hear the appeal, and confirmed the order of removal.

The number of churchwardens and overseers was admitted, at the sessions, to be as above stated. No evidence was given as to the authority of any person to sign for a churchwarden or overseer, nor as to the guardian's right to sign. It appeared, by affidavit in opposition to the rule, \*508] that Allhallows the Great was one \*of ninety-eight parishes comprised in a union called the city of London union, created under stat. 4 & 5 W. 4, c. 76, s. 26, and that John Elsden was the only guardian appointed under the act for that parish, and was a member of the board of guardians for the union.

Wallinger now showed cause. The notice of grounds was not deli-

vered, according to stat. 4 & 5 W. 4, c. 76, s. 81, by "the overseers or guardians of the parish appealing" "or any three or more of such guardians" "under their hands." As to the signature on behalf of Hammond, even if a parish officer might authorize another person to sign for him, no proof of such authority is offered. But in *Regina v. The Recorder of Worcester*, (a) \*this court held that a notice of grounds of appeal signed by the attorney for the appellant parish "as attorney for and on the behalf of the churchwarden and overseers" was insufficient, though it was proved that they had authorized him so to sign. Then, as to Elsdon, the guardian, if the union were one formed under Gilbert's act, (22 G. 3, c. 83,) it might be contended that such guardian, together with an overseer and churchwarden, or even alone, might give a sufficient notice; but this is a union under stat. 4 & 5 W. 4, c. 76, which, by sect. 38, expressly provides that (except in cases of which the present is not one) no guardian of any board formed under that statute "shall have power to act in virtue of such office except as a member and at a meeting of such board." And, if guardians under this act could sign a notice of grounds of appeal, sect. 81 requires the signature of three. The notice here purports to be given by the churchwardens and overseers: Elsdon adds the word "guardian" to his name, but without any thing to explain further the capacity in which he professes to act. *Regina v. The Justices of the West Riding*, (*Harnley v. Rothwell*, 13 Law J. (N. S.) 39, Mag. Ca. Bail Court,) shows that a guardian, signing as such, must sign in the very character from which his authority is derived. It may be argued that in this case a majority of the parish officers have signed; and reference may be made to *Rex v. The Justices of Warwickshire*, 6 A. & E. 873, where lord DENMAN, C. J., is reported to have said that notice signed by a majority of the "officers" is good; but the report of the same judgment in the Law Journal, 6 Law J.

(a) *Regina v. The Recorder of Worcester* was argued in Q. B., Easter term, 1838, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js., on motion for a mandamus to enter continuances and hear an appeal against an order of removal.

The notice of grounds of appeal began: "To the churchwardens and overseers," &c. "As attorney for and on behalf of the churchwarden and overseers of the poor of the parish of St. Owen," &c., "I do hereby give notice to you and each and every of you," &c.; and was signed "yours, &c. Richard Sill."

Mr. Sill deposed, in support of the rule, that he was consulted by the churchwarden and overseers concerning the order of removal, and was instructed by them to institute an appeal; and that he read over the notice to them, and they thereupon authorized him to sign it on their behalf, which he did. The sessions held the notice defective, and confirmed the order "not on the merits." The appellants then moved to enter and respite an appeal against the same order to the next sessions, which was refused, on the ground that an appeal against the order had just been heard and determined.

Sir W. W. Follett showed cause against the rule, (April 28th;) and it was supported by F. V. Lee, who did not contend for the validity of the notice, but argued that the sessions ought to have entered and respited the appeal. Rule discharged.

S. C., as *Regina v. The Justices of Worcester*, 1 Will. Woll. & Hodg. 152, which was cited in the argument.

(N. S.) 113. M. C., gives the word "overseers." And, if a majority of  
 \*510] "officers" were sufficient, any of the persons included under that  
 name by the interpretation clause 4 & 5 W. 4, c. 76, s. 109, might  
 sign. (They also contended that the objection was not waived by any  
 expression used in the correspondence.)

*Charnock* and *Arnould*, contra. It is not disputed that two of the proper officers have signed this notice; the name of a third is subscribed by a person assuming to sign for him; and the court will not take it for granted that he does so without authority. William Hammond himself may have been present, and unable to write. *Regina v. The Recorder of Worcester*, ante, p. 508, note (a), differs from this case, because there it appeared by the language of the notice that the body of parish officers had attempted to invest an attorney with their function of giving the statement of grounds of appeal under sect. 81 of stat. 4 & 5 W. 4, c. 76. As to the signature of Elsdén; nothing in the act requires that a guardian signing a document of this kind should state the exact nature of his functions. If he was a guardian under Gilbert's act, it will scarcely be contended that he might not give this notice. And, if he was a guardian under stat. 4 & 5 W. 4, c. 76, it does not appear that his signature was not given at a board, according to sect. 38, or that a notice of this kind might not be signed there, the act being one which, in the words of that section, concerns "the relief of the poor in such union." [PATTESON, J. No guardian is appointed under that statute to act for a particular parish, except by sect. 39, where a board is expressly constituted to act, not for a union, but expressly for a particular parish.] Then as to the \*correspondence.  
 \*511] [Lord DENMAN, C. J. We cannot enter into that question.

The sessions were the proper judges of it. The principal objection is answered if either the signature for Hammond or that of Elsdén be sufficient.

Lord DENMAN, C. J. I think the sessions have done rightly. Stat. 4 & 5 W. 4, c. 76, s. 81, requires that the notice of grounds shall be under the hands of a majority of the parish officers; and the question is whether this notice has been so given. First, as to the signature of Hammond, it is clear that a person's signing, and saying that he does so for another, cannot make the signature the act of that party. The person signing may be a volunteer: and he, and not the person whose name is subscribed, may have deliberated upon the matter to which the name is added. Secondly, as to Elsdén. A guardian appointed for a union under stat. 4 & 5 W. 4, c. 76, is not a parish officer. By sect. 38 he may act at a board for the purposes mentioned in that section; but there is nothing which makes him a parish officer for any other purpose. The interpretation clause, if it could be resorted to, would introduce many persons as officers who clearly are not meant to perform the duty in question.

PATTESON, J. Sect. 81 does not in terms require a majority of the "parish officers" to give notice of grounds of appeal, but directs that

“the overseers or guardians of the parish appealing against such order, or any three or more of such guardians,” shall give it. The guardians of a union are not guardians for that purpose; nor do I know of any clause in the statute which authorizes them so to act. The mention of guardians of \*a parish, in sect. 81, can apply only to those who may be ap- [\*512  
pointed by order of the commissioners under sect. 39.

WIGHTMAN, J.(a) I am of the same opinion. Where a party is supposed to sign for another, the authority should appear. No evidence of authority appears in this case, beyond the mere profession of the party signing. As to Elsdon, it is contended that the mere addition of “guardian” to his name is sufficient, a guardian being a parish officer. But sect. 38 excludes the guardian of a union from acting except as a member, and at a meeting, of his board, unless in particular cases, of which this is not one. Whether or not the objection was waived in the correspondence was a point entirely for the sessions. Rule discharged.(b)

(a) Williams, J., was at the Central Criminal Court.

(b) See *Regina v. Church Knowle*, 7 A. & E. 471; *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480.

And see the preceding and next two cases. Also, post, *Regina v. Leominster*, p. 640. *Regina v. Bedingham*, p. 653.

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\*The following cases were decided in Trinity term, 1845. [\*513

The QUEEN v. The Guardians of the Poor of LAMBETH.

The QUEEN v. The Inhabitants of ST. MARY, SOUTHAMPTON.

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The QUEEN v. The Guardians of the Poor of LAMBETH.

Where the laws for the relief of the poor in a single parish are administered by a board of guardians under stat. 4 & 5 W. 4, c. 76, s. 39, the guardians are officers of the parish, and a notice of chargeability, under sect. 79, signed by three or more of them is well signed.

By a local act, 13 G. 3, c. 50, several parishes were united for the purposes of the relief of the poor, and a board of guardians was constituted for the united district, with full powers for maintaining, relieving and employing the poor; repairing and enlarging workhouses; laying rates for the purposes of the act on the ratable property in the district (distinguishing each parish;) binding poor children apprentices; taking bastardy bonds; and granting parish certificates: and it was provided that no poor rate was to be laid in the several parishes or either of them, other than was directed by the act; that no settlement appeal should be made, prosecuted or defended by any of the churchwardens or overseers of the several parishes without an order of the guardians; that the act should not be construed to alter the laws then subsisting, respecting the removal of the poor, between any parish or place without the district and any of the parishes within the same, but such laws should continue in force, except in the case of certificates and appeals (as above;) and that all costs which should accrue to any of the parishes thereby united, from the prosecution or defence

of any settlement appeal, should be defrayed out of the rates to be raised by virtue of the act.

An order was obtained for the removal of a poor person from one of the united parishes to a parish out of the district: and a copy of the order and examinations and a notice of chargeability was signed and sent to the overseers of the last mentioned parish, not by the churchwardens and overseers of the removing parish, but by three guardians of the united district, both the notice and order stating that the pauper was chargeable to the removing parish.

*Held*, that the guardians of the united district were not officers of the several parishes comprised therein, and that the notice of chargeability was insufficient.

On appeal against an order of two justices for removing Jane Leary and Margaret Leary from the parish of Lambeth in Surrey to the parish of St. Martin in the Fields in Middlesex, the sessions quashed the order, subject to the opinion of this court upon the following case.

\*514] \*On the hearing of the appeal the appellants objected that the notice of chargeability was bad on the face thereof, on the ground that it was signed, not by the overseers, but by the guardians of the poor of the respondent parish. It appeared that the parish of Lambeth was constituted a union<sup>(a)</sup> of itself with a separate board of guardians of the poor by virtue of the thirty-ninth section of stat. 4 & 5 W. 4, c. 76, under an order of the poor law commissioners dated 19th November, 1835. The notice of chargeability, which was in the usual form, was signed as follows.

David Sangster,	} Guardians of the Poor of the said parish of Lambeth."
J. Bidden,	
Thomas Brown, Junior,	

The Court of Quarter Sessions considered that the notice of chargeability should have been signed by the overseers of the poor and not by the guardians, and quashed the order, subject to the opinion of this court on the question, whether the notice of chargeability ought to have been signed by the guardians or by the overseers. If this court should consider that the signature by the former was sufficient, the order of sessions was to be quashed and the order of removal confirmed: if this court should be of opinion that the notice ought to have been signed by the overseers, the order of sessions quashing the order of removal was to stand.

*Charnock* in support of the order of sessions. 'This case turns upon the construction which is to be given to the words in stat. 4 W. 5 W. 4, c. 76, s. 79, prohibiting the removal of poor persons under any order of removal, until twenty-one days after a notice of chargeability, accompanied

\*515] by certain other documents, shall have \*been sent "by the overseers or guardians of the parish obtaining such order, or any three more of such guardians, to the overseers of the parish to whom such order shall be directed." This depends upon the meaning which is to be attached to the word "guardians." Originally the power to take out orders of removal was confined to churchwardens and overseers; and it

remains in them unless divested by statute. The poor law amendment act transfers the management of workhouses, and the superintendence of relief, to the board of guardians, but does not interfere with the power of the churchwardens and overseers to take out orders of removal. The powers of the board of guardians of unions are defined by sect. 38; and they are invariably described as guardians of the poor, never as guardians of the parish in which they are elected, in this respect differing from the guardians under Gilbert's act (22 G. 3, c. 83,) who are expressly made guardians of the poor for each parish, and (sect. 7) invested with all the powers and authorities given to overseers of the poor, except as to making and collecting rates. It follows that the guardians of the union have no power to send notices of chargeability on behalf of any of the parishes in the union: and, where the laws for the relief of the poor for any single parish are administered by a board of guardians, it is enacted by stat. 4 & 5 W. 4, c. 76, s. 39, that "such board shall be elected and constituted, and authorized and entitled to act, for such single parish, in like manner in all respects as is hereinbefore enacted and provided in respect to a board of guardians for united parishes." Therefore guardians under sect. 39 cannot have more extensive powers than guardians under sect. 38; and it was decided in *Regina v. The Justices of Surrey*, ante, p. 506, that the guardians of a union are not parish officers for the purpose of sending notices of appeal. PATTESON, J., indeed appears to have said there that the word "guardian," in sect. 81, applies to a guardian under sect. 39; but, if that were so, he would not be entitled to act "in like manner in all respects" as a guardian under sect. 38. The word "guardians," in sect. 39, seems properly referable to guardians under local acts, or under Gilbert's act, who are invested with the general powers of overseers: the number of guardians for any parish under that act may, by stat. 41, G. 3, (G. B.) c. 9, s. 1, be increased to four or more, a number sufficient to satisfy the words "any three or more of such guardians" in stat. 4 & 5 W. 4, c. 76, s. 79. The other cases that have been decided on this enactment turn on the question what number of the proper officers ought to sign: *Rex v. The Justices of Warwickshire*, 6 A. & E. 873; *Rex v. The Justices of Derbyshire*, 6 A. & E. 885; *Rex v. Westbury*, ante, p. 500. Where the statute intends to confer powers on the guardians of unions it does so in express terms; it does so, sect. 72, as regards applications for orders of maintenance; and the subsequent bastardy act, 2 & 3 Vict. c. 85, maintains the same distinction. [\*516]

*Bovill*, contra. The meaning attributed to the word "guardians," in sect. 81, by PATTESON, J., in *Regina v. The Justices of Surrey*, ante, p. 506, is that for which the respondents contend in construing sect. 39. The argument on the other side assumes that the single parish under sect. 39 is the same as a union under sect. 38: but sect. 39 does not constitute the single parish a union, it only enacts that it shall be governed by a board of guardians for the parish. There is no foundation [\*517]

for the alleged distinction between guardians of the poor and guardians of the parish. In Gilbert's act, 22 G. 3, c. 83, both terms are used synonymously; compare sects. 2, 3, 4, 7, 21 and 38 of that act. The references to guardians in the poor law amendment act are also various. In the case of a single parish there is no reason why the board of guardians should not exercise all the functions of overseers: the object of the act was, in the larger parishes, to vest the control of the funds in the board of guardians instead of the overseers. The interpretation clause, sect. 109, supports this view of the case: it declares that the word "guardian" shall "be construed to mean and include any visiter, governor, director, manager, acting guardian, vestryman, or other officer in a parish or union, appointed or entitled to act as a manager of the poor, and in the distribution or ordering of the relief to the poor from the poor rate under any general or local act of parliament." Here the parties who signed the notice were the acting guardians for the parish. It cannot be supposed that sect. 79 was intended to meet so rare an occurrence as a parish under Gilbert's act having three guardians: that act, the only one of that series expressly referred to in the poor law amendment act, gave parishes only one guardian each; the number was afterwards increased to two, at the discretion of the justices,<sup>(a)</sup> and ultimately to four or more.<sup>(b)</sup>

*The Court* intimated that before giving judgment in this case they wished to hear the argument in

(a) By stat. 33 G. 3, c. 35, s. 2.

(b) By stat. 41 G. 3, (G. B.) c. 9, s. 1.

518\*]      \*The QUEEN v. The Inhabitants of ST. MARY,  
SOUTHAMPTON.

ON appeal against an order of two justices for removing Ann the wife of John Whitlock, and their two children, from the parish of St. Mary, Southampton, to the parish of Botley, both in the county of Southampton,<sup>(a)</sup> the sessions quashed the order on the grounds hereinafter mentioned, subject to the opinion of this court on the following case.

The notice of chargeability sent with the other documents required by the statute was as follows.

"As to the removal of Ann Whitlock the wife of John Whitlock, and their two children.

"To the churchwardens and overseers of the poor of the parish of Botley, in the county of Southampton.

"Take notice that the above named Ann Whitlock and her two children, now residing in this parish, have become chargeable to the said parish of St. Mary, and that an order of justices has been obtained for their

(a) The order was addressed, in the usual manner, "to the churchwardens and overseers of the poor of the parish of St. Mary," &c.; it recited a complaint made by them, that the paupers had come to inhabit in the parish of St. Mary, &c., and authorized the churchwardens and overseers to remove, &c.

removal to your parish of Botley, as their last place of legal settlement, (copies of which order of removal, and also a copy of the examinations on which such order of removal was made, are herewith sent.)

“Dated this 11th day of March, 1844.

E. Williams D. P.	}	Guardians of the Poor of the united parishes of Southampton.”
E. M'Guik,		
R. Peirce,		

\*The parishes of the town and county of the town of Southampton, consisting of Holy Rood, St. Michael, All Saints, St. Lawrence, St. John, and St. Mary, are by stat. 13 G. 3. c. 50, (a) entitled “An act for better regulating the poor, and repairing the highways, within the town and county of the town of Southampton,” united into one district for the purpose of maintaining, relieving and employing the poor of the said several parishes from one common fund; and there is within the said district, by virtue of the said act, a corporation of guardians incorporated by the name of “The Guardians of the Poor within the town and county of the town of Southampton,” having perpetual succession and a common seal, to whom the care and management of the poor of the said several parishes is by the said act committed, and conducted at a house fitted up for the reception of the poor in the said town and county of the town of Southampton. [\*519]

There are two churchwardens and two overseers of the poor of the said parish of St. Mary.

The parties by whom the notice of chargeability was sent, and whose names were respectively subscribed to the same, were not churchwardens or overseers of the parish of St. Mary, but were members of the corporation of guardians under the said act; that is to say, the said E. Williams was elected guardian for the parish of St. Michael, the said E. M'Guik for the parish of Holy Rood, the said R. Peirce for the parish of St. Mary.

If this court should be of opinion that the notice of chargeability was signed and sent by the parties proper and competent in the law to sign and send the same, the order of sessions was to be quashed; if this court \*should be of the contrary opinion, the order of sessions to be confirmed. [\*520]

*Saunders and Pashley* in support of the order of sessions. The distinction between this case and *Regina v. The Guardians of Lambeth*, ante, p. 513, is, that the notice now before the court was sent by guardians of a union of several parishes, so that the case falls within the decision in *Regina v. The Justices of Surrey*, ante, p. 506. There is a clear distinction between guardians of a union under stat. 4 & 5 W. 4, c. 76, s. 38, and guardians of a parish under sect. 39; the former are, by stat. 5 & 6 W. 4, c. 69, s. 7, incorporated as the board of guardians for the union; and there is nothing making them parish officers. The local act, 13 G. 3, c. 50, s. 1, declares that “the several parishes within the said town and

(a) See the clauses cited in the course of the argument.

county of Southampton, and liberties thereof, shall be for ever united into one district, for the purpose of maintaining, relieving, and employing, the poor of the said several parishes ;” and it incorporates the guardians. By sect. 45, “no appeal shall be made, prosecuted, or defended, by any of the churchwardens or overseers of the said several parishes for the time being, touching the settlement of any poor person or persons whatsoever, without an order of the said guardians at one of their said courts for that special purpose to be made.” By sect. 46, “neither this act, nor any thing herein contained, shall be construed, deemed, or taken to alter or change the laws, now subsisting, respecting the removal of the poor between any parish or place without the district hereby united, and any or either of the parishes within the same ; but such laws shall continue and be in force, any thing hereinbefore \*contained to the contrary notwithstanding,  
 \*521] save and except in the case of certificates and appeals upon such removals as hereinbefore mentioned.” The notice under stat. 4 & 5 W. 4, c. 76, s. 79, is to be sent “by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians ;” here the overseers of one parish obtained the order, and under stat. 13 & 14 Car. 2, c. 12, which is kept in force by sect. 46 of the local act, the churchwardens and overseers were the only parties that could take out the order of removal : the only alteration in the law is, that sect. 45 of the local act imposes a condition precedent to the exercise of the right to appeal. Besides which, to have any validity under stat. 4 & 5 W. 4, c. 76, ss. 38, 39, the notice ought to be signed at a meeting of the board ; and under the local act it ought to be under seal, and in the corporate name, and (sect. 15) to be adopted at a court or assembly, the “mayor, the said deputy president for the time being, or one of them, and also six other guardians at least,” being present to constitute the court or assembly. None of these requisites are shown on the face of the notice, which is therefore bad, according to the decision in *Regina v. The Justices of the West Riding*, (*Harnley v. Rothwell*, 13 Law N. S. Mag. Ca. 39, Bail Court,) where PATTESON, J., held that a notice of appeal signed by a guardian under Gilbert’s act, but describing him merely as an overseer, though in fact he was the proper party to give the notice, was insufficient. The same result follows from the omission to give notice in the corporate name.

\*522] There is nothing in either statute authorizing the \*guardians to act otherwise than under seal : a corporation acts and speaks only under seal : *Arnold v. The Mayor of Poole*, 4 M. & G. 860, shows how strictly this rule is adhered to.

*W. H. Watson and Archbold*, contra. This union is not like those under the Poor Law Amendment Act, which are restricted to the maintenance and management of the poor ; nor is it like the unions under Gilbert’s act, where, though the guardian is invested with most of the powers of the churchwardens and overseers, these latter retain the exclusive power of

rating. In the union under the local act, by sect. 1 the guardians are made guardians of the poor within the town and county of the town of Southampton; by sects. 16, 17, 18, 19, they may appoint officers, contract for supplying the workhouse with materials, clothing, and provisions, borrow money, and fit up a hospital as a workhouse, paying for the same out of the assessments under the act. By sect. 21, they are empowered to "rate and assess, and with as much equality and indifference as possible, to raise by taxation of every inhabitant," &c., "within the said district, distinguishing each parish, such sum and sums of money as they the said guardians shall think necessary for" "the purchasing, erecting, repairing, or finishing" "workhouses, for the purposes in this act mentioned, and for paying the interest of any money to be by them borrowed, and for defraying the expenses of the current quarter, and for and towards paying off and discharging the principal money so to be borrowed;" these rates are, by sect. 23, to be levied as rates are directed to be levied by stat. 43 Eliz. c. 2, or by any subsequent act or acts relating to the relief of the poor. \*By sect. 31, "no rate or assessment shall be made for the relief of the poor of the said several parishes, or of either of them, other than is in and by this act directed." By section 35, the guardians are to have the entire management "of all the poor in the several parishes and places in the said town and county of the town;" by sect. 39, they may put forth poor children as apprentices; by sect. 42, they may grant parish certificates; by sect. 44, bastardy bonds are to be made to them; by sect. 45, no appeal touching settlement shall be made, prosecuted or defended by the churchwardens and overseers of the several parishes without their order; and, by sect. 47, "all costs and charges which shall accrue to any or either of the parishes hereby united, by or on account of the prosecution or defence of any appeal or appeals touching or concerning the settlement of any person or persons, shall and may be defrayed, from time to time, by and out of the rates to be raised by virtue of this act, and not otherwise." The effect of these enactments is, that the several parishes are united into one district for all purposes connected with the maintenance of the poor, even for purposes of settlement *inter se*; though, as regards third parishes, and to prevent the merger of settlements acquired in the several parishes before the union, (a) the settlement still remains as it would have been independently of the act, so that the power of giving notice of appeal is still vested in the overseers of the several parishes. But the right to take out an order of removal belongs to the body on which the burden falls: the language of stat. \*13 & 14 Car. 2, c. 12, s. 1, shows that; for it directs the application to be made by the churchwardens or overseers, though by sect. 21 it provides that in parishes, which by reason of their largeness cannot reap the benefit of stat. 43 Eliz. c. 2, the poor shall be maintained within their several townships, in which case, as there are no churchwar-

(a) See *Regina v. Tipton*, 3 Q. B. 215; *Regina v. Hunnington*, ante, p. 273

dens of the township, the expression "churchwardens or overseers," in sect. 1, must be taken to mean "parish officers;" and therefore, in the present case, it means the guardians of the union. The chargeability is to the district, not to the parish: the overseers cannot with truth complain that the pauper is chargeable to the parish, nor give notice that he is chargeable to the parish; and, if the documents in the case now before the court have been inaccurately drawn up in the usual form, no question as to the effect of that mistake is reserved for the opinion of the court. It is not necessary to give the notice under seal or in the corporate name, because the Poor Law Amendment Act, in requiring the notice, requires only that it shall be sent by three guardians.

**LORD DENMAN, C. J.** In the first of the two cases that have been argued before us, the order of sessions is wrong, for it is clear that the guardians of Lambeth are guardians of the parish, and so satisfy the exact words of stat. 4 & 5 W. 4, c. 76, s. 79. But the guardians of the poor within the town and county of the town of Southampton are not the guardians of the removing parish; therefore in that case the sessions were right.

**PATTESON, J.** I entertain no doubt in either of these cases. The Poor Law Amendment Act, sect. 79, \*requires the notice to be sent by  
 \*525] the overseers or guardians of the parish obtaining such order: and the Southampton Act distinctly keeps the several parishes comprised therein separate for ever with reference to all parishes and parties out of the united district. It is said that the paupers are not chargeable to the parish; but the overseers complain that they are. In the other case it is clear that the guardians are the guardians of the parish.

**WILLIAMS, and COLERIDGE, Js.,** concurred.

In *Regina v. The Guardians of Lambeth*, order of sessions quashed.

In *Regina v. St. Mary, Southampton*, order of sessions affirmed.

\*526] \***HALL v. The Mayor, Alderman, and Burgesses of SWANSEA.**

The proprietor of tolls wrongfully taken and withheld by a corporation aggregate may sue the corporation in assumpsit for money had and received.

The layer keeper of Swansea was an officer employed to keep the layers or beds for shipping in the port free from obstacles and in a proper state. He was appointed, by custom, at a leet and baron court held yearly in May and October, by the steward of the seignory of Gower, the lord of which (the duke of Beaufort) was lord of the borough and manor of Swansea. These were co-extensive. The jury of the court (composed of aldermen, burgesses and residents) presented two persons to the steward, one of whom he elected to be layer keeper. The portreeve (the head officer of the borough before stat. 5 & 6 W. 4, c. 76,) sat with the steward, but took no part in the proceedings. The layer keeper was sworn to execute the office for the year ensuing, and until another should be chosen in his stead, or he should be lawfully discharged. By act of parliament, 31 G. 3, c. 83, to the introduction of which the duke and the corporation were parties, trustees were appointed for managing and improving the harbour, but the office and rights of the layer keeper were expressly reserved. Under the authority of this act a harbour master was appointed, who performed all

the actual duties formerly discharged by the layer keeper. Tolls, other than those received by the layer keeper, were paid by the shipping which used the port to the portreeve (who paid the corporation a rent for moorage, &c.,) and to the water bailiff, an officer of the duke.

Plaintiff had, for some years before the passing of stat. 5 & 6 W. 4, c. 76, been annually appointed layer keeper. In May, 1836, he was re-appointed, under protest from the mayor of the then corporation. In October, 1838, the corporation prevented the holding of the court leet and court baron; and, in consequence, no court was held till May, 1842, when they were resumed. No appointment of layer keeper took place from May, 1836, till May, 1842, when plaintiff was reappointed. In October, 1836, the town council resolved that the appointment of layer keeper should be vested in the corporation, and the revenue added to the corporation fund. The corporation accordingly received the layer keeper's dues from January, 1837, to June, 1842. Plaintiff sued them for the amount in assumpsit for money had and received.

*Held,*

1. That plaintiff had not ceased to be layer keeper by the omission to appoint from 1836 to 1842.
2. That the office had not been, and could not be, discontinued by the corporation under stat. 5 & 6 W. 4, c. 76, s. 58.
3. That the cessation or suspension of the layer keeper's services had not affected the right to receive the tolls.
4. That the action, in point of form, was well brought.

**ASSUMPSIT** for money had and received. Counts for work done and on an account stated.

Particulars of demand. "This action is brought to recover the sum of 1000*l.* due from the defendants to the plaintiff for moneys received by the defendants in respect of certain tolls, dues and keelage, payable to the plaintiff as the layer keeper of the river Tawe, at Swansea, from the 1st day of January, 1837, to the commencement of this action."

\*Plea: non-assumpsit. Issue thereon.

On the trial, before MAULE, J., at the Glamorganshire Spring assizes, 1843, a verdict was found for the plaintiff, damages 1000*l.*, subject to the opinion of this court upon the following case. [\*527]

The plaintiff asserts that he has been for twenty years, and now is, the layer keeper of the port of Swansea, duly presented by the court leet of the manor and borough of Swansea, and appointed by the steward of the duke of Beaufort, the lord of the manor and borough; and contends that, in virtue of such appointment, he is entitled to certain tolls on shipping entering the port of Swansea. Since the year 1836, the whole amount received for these dues has been paid by the receiver to the treasurer of the corporation of Swansea instead of the plaintiff: and for the recovery of the amount so paid this action is brought.

The ancient duties of the layer keeper were to keep the layers or beds for the shipping free from obstacles and in a proper state; but these duties have been merely nominal since the appointment of a harbour-master under stat. 31 G. 3, c. 83.

The mode of appointing the layer keeper was as follows. It has been the custom from time immemorial for the stewards of the lords of the seignory of Gower, a district in the county of Glamorgan, who are also

lords of the borough and manor of Swansea, (which is within the seignory,) together with the portreeve of the borough of Swansea, to hold annually two leet and baron courts for the borough and manor of Swansea, which borough and manor are co-extensive. The juries of these courts are composed of aldermen, burgesses and residents; the last named were inhabit-

\*528] ants of the \*borough, who had nothing to do with the corporation, but were admitted to serve on the leet jury, the number of the burgesses being limited, (they did not exceed fifty :) these courts were held, the one in the spring, and the other in the autumn. At one of these courts, and for the last sixty years at the spring court, it has been the custom to appoint certain officers, one of which is the layer keeper, in the following manner. Two names are presented by the homage to the duke's steward; and the steward elects one of them, who is immediately sworn in by him at the court. The portreeve of the borough usually sat with the duke's steward at these courts, but took no part in the proceedings. The court rolls generally state the court to be holden before the steward and portreeve. There are exceptions. (Eighteen instances were mentioned, from the year 1680 to 1728, inclusive, in which the portreeve was not named.) The court rolls from 1673 to 1775, and the court rolls and books from 1775 to the present time, and some of the common hall books, were produced at the trial. Either party was to be at liberty to refer to them, so far as they were legally admissible in evidence.

The court books contain the forms of the oaths taken by the officers appointed at these courts. The oath taken by the layer keeper was as follows. "You shall well and truly execute the office of layer keeper within this borough and manor for the year ensuing, and until another shall be chosen in your stead, or you shall be lawfully discharged. So help you God."

The plaintiff was first appointed layer keeper in May, 1822. The following is a copy of the court roll containing his appointment.

\*529] \*"Borough and manor of } The court leet or view of frankpledge  
Swansea, in the county } and baron court of the most noble Henry  
of Glamorgan. } Charles, duke of Beaufort, knight of the most noble order of the Garter, and lord of the said borough and manor, held for the said borough and manor, on Monday the 6th day of May, 1822, in the guildhall of the town of Swansea, the place accustomed, before Lewis Thomas, Esquire, steward, and John Charles Collins, Esquire, portreeve." Then followed (a) the names of "The grand jury and jury of homage" attending the court, and officers, namely, serjeants at mace, deputies, common attorneys, layer keeper, searcher of leather, haywards, surveyor of the highways, and constables. The roll then stated a presentment by the jury of persons owing suit and service to the court and making default of appearance, and amercement of each burgess, tenant, juror and resiant so in default, respectively. Then followed this entry.

(a) The proceedings were more fully stated in the case.

“The said jurors do present as fit persons in election to serve the office of layer keeper within the said borough and manor for the year ensuing.

“(Sworn) James Hall (Appointed.)—John Davis.” Then appeared presentments and appointments, in like form, of other persons for the offices of hayward and searcher of leather for the borough and manor; presentments of nuisances in the streets and highways, and rescue of distress within the town, and adjudications in the several cases; presentments of persons as fit to be admitted burgesses; and, finally, presentments and amercement of persons summoned to appear that day on the grand jury and jury of homage, and making default.

\*The plaintiff was annually reappointed at the Spring leet and baron court until May, 1836. At the court held on 9th May, for [\*530 that year, before Thomas Thomas, Esq., steward, Nathaniel Cameron, Esq., the mayor of Swansea, elected according to stat. 5 & 6 W. 4. c. 76, was present, and the plaintiff was, as usual, presented, appointed, and sworn in: but the said N. Cameron at the foot of the court roll made and signed a protest in the following words. “The mayor, on behalf of the corporation, objects to the steward appointing the layer keeper, and on their behalf protests against the appointment of James Hall, N. Cameron.”

The duke's steward, who before the passing of stat. 5 & 6 W. 4, c. 76, held, by appointment of the duke also, the office of recorder of the borough and manor of Swansea, and who since the passing of that act was, under its provisions, appointed to, and now continues to hold, the office of town clerk, gave notice of a leet and baron court for October, 1838, and attended at the town hall, the place accustomed, for the purpose of holding it, but was prevented holding such court by the then mayor, Richard Mansel Phillips, Esq., by whose orders the doors of the hall were locked. in consequence of which the duke's steward in the vestibule of the hall adjourned the court till further notice, and forbore to hold courts until May, 1842, when he again resumed them. At the court of that date the plaintiff was represented by the homage, and reappointed and sworn in by the steward, the then mayor, Richard Aubery, Esq., being present and sitting with him as the portreeve used to do. The following is a copy of the appointment as entered on the court roll.

“Also the said jurors do present as fit persons in \*election to serve the office of layer keeper within the said borough and manor for the year ensuing [\*531

“(Appointed) James Hall (Sworn.)—William Strick.”

In the common hall order book of the defendants appears the following resolution, passed and entered 7th January, 1791.

“The business of the navigation being taken into consideration: Is it ordered: That the bill be presented to the House of Commons in the name of the duke of Beaufort and this corporation. That Thomas Morgan, Esq., be empowered under the common seal of this corporation to engage in their name and behalf for two-thirds of the sum necessary

for carrying on the improvements of this port, river and harbour (in case it is required by the House of Commons,) according to the estimates to be then produced. That the trustees of this bill be the duke of Beaufort and his officers, the portreeve, aldermen and twelve of the burgesses for the time being of this borough, to be annually elected by the burgesses in common hall assembled, together with twelve persons to be nominated by the proprietors and lessees of collieries, mines and minerals, and by persons engaged in copper works, potteries, saltworks, or any works or manufactories whatsoever within the said river, port and harbour, and the owners of ships and vessels frequenting this port and harbour, under the qualifications hereinafter mentioned, and so that such proprietors, &c., as above mentioned be resident within the county of Glamorgan. The qualification of proprietors and lessees of collieries and works, and engaged in any manufactories whatsoever, 2000*l*. The above named Mr. Thomas

\*532] Morgan was steward of the duke of Beaufort at the \*date of this resolution ; and his signature together with those of other members of the corporation is appended in the usual form.

In consequence of proceedings taken in pursuance of the above resolution, an act of parliament was passed, 31 G. 3, c. 83, “ for repairing, enlarging, and preserving, the harbour of Swansea,” &c. ; under which certain persons, and their successors, to be elected as therein mentioned, were appointed trustees ; and who have since had the management of the Swansea harbour ; and, under that act and other subsequent acts for the same purpose, certain tolls have been and continue to be collected from the shipping.

By sect. 1(a) it is provided : “ That the lord or lords of the seignories of Gower and Cilvey, his and their assigns and successors therein, his and their eldest son and heir apparent, his and their stewards, recorder, water baliff, coroner, and baliff of the said seignories, royalties, franchises, and liberties for the time being, and the Right Honourable the now Marquis of Worcester, Sir Herbert Mackworth, baronet, the portreeve and aldermen of the said borough” (of Swansea) “ for the time being, and twelve of the burgesses of the said borough for the time being, resident within the county of Glamorgan, to be elected and chosen annually by the burgesses in common hall assembled for that purpose on Michaelmas day in every year, after the election of the first trustees from amongst the burgesses by virtue of this act, together with twelve persons,” (naming them,) “ to re-  
\*533] present the interest of the present and future proprietors and \*lessees of collieries,” &c., (as stated in the above resolution, p. 531,) “ together with the chief agent for the time being of the Britonferry estate, in the parish,” &c., “ shall be, and are hereby appointed trustees for executing the several purposes of this act.”

(a) The court was to be at liberty to refer to any part of the act as a part of the case ; but no reference was made in the argument or judgment to any clause but those here stated.

By sect. 4 it is enacted that it shall and may be lawful for the trustees to return two persons to the steward of the duke of Beaufort, "for his choice, approbation, and the appointment of the one or the other of them, in the same manner as the election of the ancient officer of the layer keeper is conducted within the borough of Swansea;" such person to be "the clerk and receiver of the said trust, and also to be assistant to the water bailiff of the said port, harbour and river."

By sect. 30 of the same act the powers of the water bailiff and layer keeper are expressly reserved.(a) By sect. 64 the royalties, tolls and rights of the duke of Beaufort and the future lords of Gower and Cilvey, and his and their officers, are saved. And in sect. 67 there is a general saving of all rights of all persons.

The case then stated a resolution entered in the common hall order book of the defendants, 16th December, 1791, directing payment of Mr. Estcourt's bill, and all other charges on passing the harbour bill, by the common attorneys. Mr. Estcourt was the duke of Beaufort's solicitor and agent in London.

..\*A clerk and receiver was appointed under this act. Mr. Sylvanus Padley is the person now so appointed; and he has been in office since 1806: and he has collected and continues to collect from the shipping, not only the tolls under the Swansea harbour acts, but the ancient harbour dues. The ancient dues collected by him are as follows, viz: [\*534

From each vessel, if in ballast, and under 100 tons.

For portreeve	-	-	-	-	-	10d
Water bailiff	-	-	-	-	-	4.
Layer keeper	-	-	-	-	-	6.

(Then followed other tables of charges payable to the same parties.) These sums have been collected by Mr. Padley since 1806; and from that year till 1836 he paid to the portreeve, water bailiff, and lay keeper for the time being their proportions, as above. The layer keeper's proportions was paid to the plaintiff from his appointment in 1822 to the end of 1836.

The portreeve, who was the head of the old corporation, was annually elected and appointed in the manner hereinafter mentioned. The water bailiff was an officer appointed by the duke of Beaufort by deed under his hand and seal. Before Michaelmas, 1834, the portreeve received his proportion of the dues for his own benefit. From Michaelmas, 1834, until the Municipal Corporation Act came into operation, the corporation received them in consideration of an annual sum of 500*l.* paid by them to the portreeve in lieu thereof: and since that act has come into operation

(a) It enacts: "That nothing herein contained shall extend," &c., "to abridge or alter, or in anywise diminish the ancient and usual rights, power, and authority of the water bailiff within the said port and harbour, or of the duty of the ancient officer the layer keeper within the same, but that whatsoever is herein enacted as relative thereto, is to be considered in explanation, regulation, and confirmation thereof, if necessary, and they are to remain perfect and undisturbed, any thing herein to the contrary notwithstanding."

the corporation has received and continues to receive the proportion formerly of the portreeve for their own benefit.

At a meeting of the town council which took place on 5th February, 1836, a resolution was passed and entered in their minute books for appointing a committee \*to investigate the claims of the water bailiff and layer keeper to the perquisites they then enjoyed, and to take into consideration the high rate of per centage paid to Mr. Padley. On 28th October, 1836, the committee reported to the council: and the following resolution was entered on their minute book.

“Resolved: That the following report of the water bailiff’s and layer keeper’s committee be confirmed by the meeting. That the present committee propose to the town council that the appointment of water bailiff and layer keeper should be vested in the corporation; and that 5l. per cent. on the revenue be allowed for its collection; and that the amount of impost derivable be added to the corporation fund for the general benefit of the same.”

The corporation proceeded to act on this resolution: and Mr. Padley, the receiver, from 1st January, 1837, paid to the treasurer of the corporation, for their use, the dues of the water bailiff and layer keeper.

The plaintiff, in June, 1842, gave notice of proceedings for the recovery of his dues; and the council of the borough referred his claim to a committee; who reported their opinion “that Mr. Hall had been regularly appointed layer keeper by the duke; the committee, therefore, recommend that Mr. Hall be paid the amount” received by the council from Padley as layer keeper’s dues. The council adjourned the consideration of the report, and never entered upon it. The plaintiff demanded payment of the dues; and it was refused, and this action brought to recover them.

The method of appointing to the corporate offices of portreeve, common attorneys and serjeants at mace, for the borough of Swansea, before the passing of the Municipal Corporation Reform Act was as follows.

\*536] The \*aldermen met annually on 28th September, and nominated four members of their own body, who were on the following day returned to the burgesses in common hall assembled. The burgesses returned to the steward of the duke of Beaufort two names out of the four so nominated by the aldermen; and from these two the steward selected one, who was thereupon elected and sworn in portreeve by him. For the office of common attorneys four names were annually on the same day. (Michaelmas day) returned by the burgesses to the duke’s steward, out of which four he selected two who were thereupon elected and sworn in by him. Two serjeants at mace were on the same occasion elected and sworn in by the steward in the same manner as the common attorneys. None of the above officers were ever appointed in any other manner within living memory. No person but a burgess had any voice in the nomination to the duke’s steward of such officers.

The proceedings relating to the above election of corporate officers

were entered in a book kept for that purpose ; at the end of which are copies of the oaths required to be taken by corporate officers. The layer keeper's oath is not among them.

The case then set out the form of proceedings in common hall for the election of officers, as shown by the corporation books.

The portreeves paid to the duke of Beaufort, as lord, an annual fee farm rent, viz.

	£	s.	d.
Free rents - - - - -	8	1	6
Assize of ale - - - - -	8	0	0
Toll and keelage - - - - -	2	0	0
	<u>£18</u>	<u>1</u>	<u>6</u>

\*This rent is, and has been since the passing of the Municipal Corporation Act, paid to the duke by the corporation. The portreeves also paid the corporation for moorage and keelage an annual rent of 3*l*. [*\*357*]

The case then set out an order made at a hall day, holden in and for the borough on 4th October, 1790, before the then portreeve: whereby, after reciting that the portreeve hath enjoyed, by ancient custom, the following dues for and towards the expense and support of his office ; viz. moorage of ships, on payment of a rent of 3*l*. to the corporation ; quayage, on payment of a rent of 1*l*. 15*s*. to the corporation ; calf skins by act of parliament for the market ; keelage dues, pitching or tolls of fairs and markets, and other accustomed town dues, together with all the chief rents due in the town and franchise, and also the assize of ale within the same, on payment of a rent of 18*l*. 1*s*. 6*d*. to the lord of the said borough ; also a duty of 1*s*. reserved in every lease granted by the burgesses ; and that it had been proposed for the convenience of the portreeve that the corporation should rent the dues of him for the year, at a sum payable quarterly, and he had consented to receive 150*l*. ; it was ordered that the common attorneys should pay him that sum by quarterly payments ; and that the portreeve should authorize the common attorneys to receive the same, and should give them particulars of the contracts made with the several persons who had rented any of the dues of him before that agreement, not interfering with the ancient rents of 18*l*. 1*s*. 6*d*. paid by him to the lord, and 4*l*. 15*s*. to the corporation. The case also stated an order of common hall, made 7th October, 1790, appointing a collector of the portreeve's dues rented by the corporation as above stated, and all the other dues commonly called the port dues within the harbour of Swansea, and ordering that a contract should be entered into with him, and that it should be recommended to the water bailiff and the layer keeper to enter into the like contract with the same person for the collecting of such dues as might belong to them. [*\*538*]

The layer keeper's portion of the dues collected by Padley from 1st January, 1837, to 30th June, 1842, was 629*l*. 19*s*. The whole of that

sum had been paid by him to the treasurer of the town council. Since June, 1842, he had continued to receive the dues, but retained them to abide the issue of this litigation.

The case then set forth the objections raised to the plaintiff's right to recover as they are stated below in the argument.

It was agreed that the court should be at liberty to draw all such conclusions and inferences from the evidence as they should think a jury ought to have done. If the court should be of opinion that the plaintiff was entitled to recover from the defendants the amount of layer keeper's dues received by the council since 31st December, 1836, or any part thereof, the verdict was to stand for the plaintiff for such amount or part: if they should be of a contrary opinion, a nonsuit, or a verdict for the defendants, was to be entered, as the court should direct.

*W. M. James* for the plaintiff. First, the defendants allege that the office of layer keeper was an annual office, and that the plaintiff has not been duly reappointed since May, 1835. But, although the practice had been to appoint annually, the oath was "to execute the office" "for the  
 \*539] year ensuing, and until another shall \*be chosen in your stead, or you shall be lawfully discharged." As long as parties were content that it should be so, the plaintiff retained his office, though perhaps a mandamus might have been obtained to make a new appointment. The protest in 1836 was a mere scribbling on the roll. And it cannot be contended, at least by the defendants who received the dues, that the office was vacant during the years in which no appointment was made because no court was held. The plaintiff was bound to perform the duties, if the trustees did not. Secondly, it is said that the plaintiff, at the passing of stat. 5 & 6 W. 4, c. 76, was an executive officer of the borough, and that he was not reappointed according to that act. But the evidence shows no ground for asserting that the layer keeper derived his office from the borough. There was indeed an intimate connection between the manor and the borough, and the portreeve attended the courts: but it does not appear that he had any duty to perform there. With the exception of his attendance, the court was the same as any other court leet. If the corporation had surrendered its franchise, the court leet and appointment of a layer keeper would still have continued. The corporation had nothing to do with the business of this office. Thirdly, it is contended that *indebitatus assumpsit* for tolls will not lie against a corporation. But, if the defendants are in fact indebted as having wrongfully received these tolls, the duty to pay attaches, and the action lies though they have not bound themselves under their common seal. This case must be governed by the principle of necessity, laid down in *Beverley v. The Lincoln Gas Company*, 6 A. & E. 829, and *Church v. The Imperial Gas Company*, 6 A. & E. 846;  
 \*540] in which \*cases many authorities on the subject are collected. Fourthly, the case states as an objection that the defendants claim title to the tolls, and that *indebitatus assumpsit* is not the form in which

such a claim can be tried. But the mode of proceeding is the common one in such cases. (This point was not further argued.)

*Erle*, contra. First, the layer keeper before 1836 was always appointed by a court at which the portreeve as well as the steward presided. The corporation had double powers, some with reference to the borough and some to the port. Their head was the "port" reeve, an officer independent of the lord and receiving a part of the port dues. The courts were held for both the borough and the manor; and the business of both was transacted at them. The layer keeper was an officer of the port, and derived his authority partly from the steward and partly from the portreeve. After the passing of stat. 5 & 6 W. 4, c. 76, the jurisdiction of the portreeve in this respect became vested in the mayor: and, at the court in 1836, the mayor refused his assent to the plaintiff's appointment. At that period, therefore, no legal appointment of layer keeper took place. The office was annual: and the words of the oath, "for the year ensuing, and until another shall be chosen," cannot, in this case, be taken to have extended its duration. [PATTESON, J. The plaintiff was appointed in fact in 1836. Unless the mayor's concurrence was absolutely necessary; there was an appointment then.] The court, down to the passing of the municipal corporation act, was held before the mayor and steward. [COLERIDGE, J. The practice for sixty years is stated to have been that the names of candidates were presented \*to the steward, who elected.] If the steward and portreeve held the court together, it is to be pre- [\*541  
sumed that their authorities were coextensive. Secondly, stat. 5 & 6 W. 4, c. 76, s. 58, enacts that, after that statute comes into operation, the council of every borough shall appoint a town clerk, &c., and also such other officers as have been usually appointed in such borough, or as they shall think necessary, &c., "and may from time to time discontinue the appointment of such officers as shall appear to them not necessary to be reappointed." The layer keeper was an officer whom the council might have reappointed under this clause, but have not. He was not an officer of the duke of Beaufort; the duke was not bound, as lord, to perform the services for which the layer keeper was appointed, and had, therefore, no right to receive, by an officer of his, the dues paid in respect of them. [PATTESON, J. The corporation have in fact appointed themselves the layer keepers.] It is fitter that the funds should be administered by them than by a nominee of the lord. But the course they have pursued in this respect is not material; by not reappointing a layer keeper they have discontinued the appointment, as they are empowered to do by sect. 58 of stat. 5 & 6 W. 4, c. 76: and that answers the plaintiff's claim. [COLERIDGE, J. If the layer keeper was the lord's nominee, still stat. 31 G. 3, c. 83, which you concurred in obtaining, recognises the mode of electing to the ancient office of layer keeper, (sect. 4,) and reserves its powers (sect. 30.)] They are now exercised through the medium of the borough council. The layer keeper has never been considered one of the duke's

officers. He is not named among them in stat. 31 G. 3, c. 83, s. 1. The office of steward stands on a different footing; \*he never derived  
 \*542] any part of his authority from the borough; the layer keeper always did. Thirdly, the authority to receive dues in a port is founded wholly on services rendered in respect of the port, or the obligation to render them. In *Jenkins v. Harvey*, 1 C., M. & R. 877, 2 C., M. & R. 393; S. C., 5 Tywh. 326, 871, and in the argument in *The Mayor of Exeter v. Warren*,<sup>(a)</sup> now standing for judgment, the claim of dues was defended mainly on this ground. When, therefore, the services of the layer keeper ceased or were transferred, his claim to receive duties had no longer a legal foundation. And the case shows that the duties of layer keeper have for many years past been discharged by the harbour-master. Fourthly, the general rule is that an action for money had and received will not lie against a municipal corporation. It is clear from *Regina v. The Council of Lichfield*, 4 Q. B. 893, that, even if the corporation there had borrowed a sum of money, they could not have made themselves liable in this form: and this, if true in the case of an express contract, applies *à fortiori* to an implied one. *Beverley v. The Lincoln Gas Company*, 6 A. & E. 829, and *Church v. The Imperial Gas Company*, 6 A. & E. 846, show the exceptions to the rule, and show also that this case does not fall within them. The general principle, affirmed in the latter case, p. 861, is that a corporation cannot "express its will or do any act" except under seal. The exceptions particularized in *Beverley v. The Lincoln Gas Company*,<sup>(b)</sup> are  
 \*543] where a trading company \*contracts for articles of constant requirement and to a small amount, in the way of its trade. But in *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, the Court of Exchequer upheld the doctrine that, except as to trifling matters and bargains in the way of trade, a corporation can contract only by seal; and they treated the rule as not merely technical, but resulting from the very constitution of bodies corporate. The limit laid down in that case is recognised by the Court of Common Pleas in *Arnold v. The Mayor of Poole*, 4 Man. & G. 860.<sup>(c)</sup> These latter decisions show that, even in the case of a loan, an action on simple contract would not lie against any corporation aggregate; and the objection is peculiarly strong on behalf of a municipal corporation, since they are dealing with a borough fund, and, if obliged to pay a contested demand, may have to tax persons who have become inhabitants since it was incurred. [COLERIDGE, J. Corporations bring actions of simple contract for tolls.] The right is not necessarily mutual; this is noticed in *Arnold v. The Mayor of Poole*, 4 Man. & G. 896. [COLERIDGE, J. If the corporation wrongfully took these tolls, were not they liable for every sixpence, as received by their agent? Lord DENMAN, C. J. In *Yarborough v. The*

(a) Judgment given, in favour of the claim of dues, in the vacation after this term. See post.

(b) Erle read the judgment, from "At first the rule" to "action is maintainable," 6 A. & E. pp. 844—845.

(c) Erle read the judgment, from "The case" to "trading purposes," pp. 894—896

*Bank of England*, 16 East, 6, the court said that, after verdict against a corporation in trover, they would presume an authority under seal to do the act, if such authority was essential.] If the council have authorized Padley, as their receiver, to do something unlawful, the mayor, aldermen and burgesses are not liable for it. \* [PATTESON, J. It cannot be contended, since *Yarborough v. The Bank of England*, 16 East, 6, that a corporation would not be liable in trover if their agent had wrongfully taken goods. If the rule were otherwise, corporations would be a great nuisance. Yet in such a case inhabitants newly come into the borough might be affected.] If the individual only who does the wrongful act is looked to, the complaining party has his remedy. [COLERIDGE, J. The corporation might employ a beggar.] In *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, and *Arnold v. The Mayor of Poole*, 4 M. & G. 860, it was no part of the objection that the claims were not conscientious. [PATTESON, J. The only difference I see between *Arnold's Case* and that of a servant employed at small wages is the comparative inconvenience of insisting on a contract under seal in the latter case.] It could only be said that the authorizing an agent to undertake a lawsuit requires a somewhat more deliberate sanction than the common employment of a servant. [\*544]

*W. M. James*, in reply, was directed to confine himself to the last point. The argument of necessity applies here as much as in *Beverley v. The Lincoln Gas Company*, 6 A. & E. 829, or *Church v. The Imperial Gas Company*, 6 A. & E. 846. The corporation have directed and recognised the receipt of tolls by their agent; the case, therefore, comes within the principle of *De Grave v. Mayor, &c., of Monmouth*, 4 Car. & P. 111.

LORD DENMAN, C. J. This is an action of assumpsit for fees of the office of layer keeper, which the \*defendants have been receiving for several years. The office is an ancient one. Mr. Hall, the plaintiff, was appointed in 1835, for the year ensuing, but further (as is the case on other yearly appointments) until another officer should be chosen in his stead. As to the first question raised, I think there is sufficient evidence of Mr. Hall's continuance in the office after the year, no proof being given of any thing done to determine his appointment. It is urged that the plaintiff was nominated by the steward and portreeve jointly: still I think that he held under a good appointment, and one which continued after the year. It is argued that the office itself has been abolished under stat. 5 & 6 W. 4, c. 76, s. 58: but the corporation have abolished it no further than by receiving the fees themselves. To say that that is a suppression of the office is a bold assumption. There might have been some ground for it if they had met and abolished the fees: but by receiving the fees they preclude themselves from making this suggestion. The defendants also contend that the appointment of a harbour-master under the local act, 31 G. 3, c. 83, and the transfer to him of the duties of a layer keeper, have, virtually at least, determined the right of the layer [\*545]

keeper to receive fees. It is true that the act does not make any express provision on this subject; but the office is clearly kept alive; and, if that still continues, it is not for the corporation, who have received the fees as belonging to the office, to keep them from the party claiming as officer, on the ground that they are no longer claimable in that right. The whole question is to what party they belong. There is no doubt, therefore, as to the justice of this demand. The remaining question is purely techni-

\*546] cal; whether the action of *\*indebitatus assumpsit* for money had and received will lie. As to this, the two cases of *Beverley v. The Lincoln Gas Company*, 6 A. & E. 829, and *Church v. The Imperial Gas Company*, 6 A. & E. 846, are clear, and show that there may be an *assumpsit* in law by a corporation aggregate, though they have not contracted under seal. The decisions in the Exchequer and Common Pleas were also consistent with justice, and not contradictory to the preceding cases. In *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, it was fair to say that a gentleman laying out large sums of money for corporation purposes should be able to show that he had taken proper means to bind the corporation, and had procured their assent under seal, and as their deliberate act. Still more reasonable is it, where, as in *Arnold v. The Mayor of Poole*, 4 Man. & G. 860, an attorney sues a corporation upon a bill of many hundred pounds, to say, "If you, who know how a corporation ought to be bound, seek to fix this liability upon them, you should be prepared to prove a contract under the corporation seal. But the cases show that, in other instances, this kind of argument will not apply. We are not to regard the circumstances of particular cases, but to look at the governing principle; and that is necessity, the only proper ground on which these actions, in the case of a corporation aggregate, can be placed. Both the Court of Exchequer and Court of Common Pleas say that for trivial matters, frequently occurring and essential to the business of the corporation, actions of simple contract may be maintained, and the plaintiff not required to show an engagement under the common seal. So  
\*547] here, *\*if* the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it. The question is, what title they have to retain the money: and the only title they show is their having taken it. Their wrongful act binds them to return it, without any actual promise.

PATTESON, J. I am of the same opinion. This is an ancient office; and the officer is sworn in for a year, and until another be chosen in his stead, or he himself lawfully discharged. It is true that, in practice, the officer was reappointed every year: but the nature of the office appears from the oath; if no successor was appointed, the party who was sworn in continued to serve. The difficulty I felt was in deciding whether he did not require a reappointment to maintain this action. But I think he was sufficiently an officer for the purpose, no other having been appointed in or after 1836. It is argued that the corporation had some authority in

the court at which the appointment took place: but what had the portreeve to do with this office? The layer keeper was presented by the jurors at a court where the portreeve sat; but the style of the court was, "the court leet or view of frankpledge and baron court of" the duke of Beaufort, "held for the said borough and manor" of Swansea, "before Lewis Thomas, Esquire, steward, and John Charles Collins, Esquire, portreeve." That does not make it the court of the portreeve or of the steward; it is the court of the lord; and he, by his steward, picks out one of the two persons presented by the homage. The corporation has no more to do with it than I have. \*Formerly there were duties attached to the office of layer keeper; they appear to have been transferred in 1791 to the harbour-master; but the act, 31 G. 3, c. 83, preserves the office and rights of the layer master. It does not appear that he might not be called upon again to discharge duties; but at all events his rights are preserved; and the fees of the office have been received to this day; till 1836, by the plaintiff himself. Then the corporation choose to say, "this is a corporate office, and we will not reappoint to it." They have nothing on earth to do with it, and no pretence for interfering with it but their own determination. They say, not only, "we will not reappoint," but "we will make ourselves the officer." So extraordinary a proceeding was never taken. If they had any power over the office they could not appoint themselves. They have received money which they, at all events, had no right to, and now say "an action does not lie against us because we have not engaged under seal to repay it." Such an answer cannot prevail unless we are obliged to yield to the technical argument. I am not aware that it has ever been held that an action for money had and received lies against a corporation in respect of money wrongfully taken; but that it should lie is within the principle of the late cases in this court, and still more within that of *Yarborough v. The Bank of England*, 16 East, 6, for, if trover lies against a corporation for goods, it cannot be contended that money had and received will not lie if they have wrongfully taken money. The true ground is necessity. It cannot be expected that a corporation should put their seal to a promise to return \*moneys which they are wrongfully receiving. Then, if the seal were necessary, the party injured would be without remedy. [\*548

[COLERIDGE, J. There is no question as to the actual receipt of this money by the corporation as a corporation. Their resolution shows it; and their treasurer has taken the money. Then, if the sum were a small one, it could not be disputed, according to the two recent decisions in this court, that money had and received would lie for it. What, then, is the principle on which the importance of the act or sum has been held to make a difference in the right to recover against a corporation? The cases lay it down that, where the transaction is of small moment and of daily occurrence, necessity requires that the corporation should be liable to an action of simple contract. And I think that opinion is right, and conformable to

ancient authorities. Then, apply the principle here. . Is it to be expected that a corporation, having wrongfully taken money to which an officer was entitled, will put their seal to a bond for returning it? The law is not so absurd. The principle on which it acts in such a case appears from *Yarborough v. The Bank of England*, 16 East, 6, where this court decided that trover lay against a corporation for goods wrongfully taken. Here, then, if the corporation had taken a person's coat, or any other article of small value, trover would clearly have lain; and so it would, whatever the value might have been. Then can it be said that, if they had turned the goods  
 \*550] into money, and put it into the \*corporation chest, an action would not lie against them for money had and received? Nothing which Mr. *Erle* has advanced supports such a proposition.

WIGHTMAN, J. The only point which appeared to me questionable was that on the form of action. It is, no doubt, established by the decisions in this court that *indebitatus assumpsit* will lie against a corporation aggregate upon an executed consideration; but the cases in the Exchequer and Common Pleas show that this rule does not universally apply. The circumstances under which the action is admitted to be maintainable are, where the supposed contract is for things of small moment, the occasion for which frequently recurs, and where it is matter of necessity that the corporation should be bound without an engagement under seal. Now the ground of necessity is established beyond a doubt in this case. In *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, and *Arnold v. The Mayor of Poole*, 4 Man. & G. 860, the parties who acted for the corporation might have obtained from them a formal contract in the outset of the transaction: but here no such opportunity existed; the corporation merely possessed themselves of the plaintiff's money and refused to give it up. The case is completely analogous to that of trover against a corporation for goods.  
 Judgment for plaintiff.

\*551]

## \*IRELAND v. BERRY.

Reg. Gen. Trin. 3 W. 4, which orders that a defendant who has been arrested on a *capias* shall be discharged unless the plaintiff declare before the end of the term next after the arrest, does not apply to an arrest upon a *capias* issued by judge's order under stat. 1 & 2 Vict. c. 110, s. 8.

BARSTOW in this term obtained a rule to show cause why the defendant should not be discharged out of the custody of the sheriff of the county of Somerset as to this action, on the ground that the plaintiff did not declare against him before the end of the term next after the arrest. It appeared that the defendant had been arrested in July, 1843, by a *capias* under a judge's order, under stat. 1 & 2 Vict. c. 110, ss. 3, 4. Plaintiff not having declared in Michaelmas term, defendant took out a summons to show cause why he should not be discharged. Cause was shown on 9th

December, 1843, before COLERIDGE, J., who declined making any order. Afterwards the plaintiff caused an appearance to be entered, and delivered a declaration.

*Montague Smith* now showed cause. The application is made on the assumption that R. Trin. 3 W. 4, 5 B. & Ad. 467, applies to a *capias* issued under stat. 1 & 2 vict. c. 110. But this rule was applicable only to process upon a *capias* under stat. 2 & 3 W. 4, c. 39, s. 4. That section provided that "the plaintiff in such process *may*, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant," &c. Then by R. Trin. 3 W. 4, 5 B. & Ad. 467, it was ordered that "the plaintiff in such process *shall* declare against such defendant before \*the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be [\*552] entitled to be discharged from such arrest or detainer, upon entering an appearance," &c. The *capias* was then process in the course of the cause; it took the place of a summons, as a commencement of the action. But, since stat. 1 & 2 vict. c. 110, the *capias*, as process in the course of the cause, is abolished: the *capias* under sect. 3 is altogether collateral, and is given merely to prevent the defendant from going out of the reach of the regular process, which itself goes on in the same way whether such a *capias* be granted or not. The only process for commencing an action is now, by sect. 2, a summons. In Mr. Jervis's note (a) on R. Trin. 3 W. 4, 5 B. & Ad. 467, it is said, "This rule is abrogated by stat. 1 & 2 Vict. c. 110." The same view is taken in 1 Chitty's Archbold's Practice, p. 137, (ed. 7.) The *capias* may now issue at any time before trial. By an arrest under the present kind of *capias* no step is taken in the cause; the plaintiff may declare in chief without admitting the defendant to be in court, or waiving the right to except to the sheriff's bail and attach the sheriff for not bringing in the body; *Regina v. Sheriff of Montgomeryshire*, 9 M. & W. 448. So the plaintiff may now proceed in the action, and yet take an assignment of the bail bond and sue the bail; *Betts v. Smyth*, 2 Q. B. 113. And the same rule was laid down by PARKE, B., in *Ede v. Collingridge*, 11 M. & W. 61; where it was decided that, if a bail bond has been given to the sheriff but bail not perfected in due time, \*and an action [\*553] has been commenced on the bail bond, such action will be stayed on bail being perfected. The principle of all these cases is that giving bail is now altogether collateral to the action. Under stat. 2 & 3 W. 4, c. 39, a warning as to the time of declaring was subscribed to the *capias*; schedule, No. 4: but there is no such warning in the case of a *capias* under stat. 1 & 2 Vict. c. 110, s. 3; schedule No. 1.

*Barstow*, contra. If the principle contended for on the other side be upheld, the plaintiff will be at liberty to harass the defendant by delaying to declare as long as he pleases, except so far as he is checked by the power which the defendant has to sign judgment if there be no decla-

(a) All the New Rules, &c. p. 104, note (a) ed. 4.

ration before the end of the term next after the service of the summons. But this is no more than the privilege which the defendant had, whether arrested or not, before stat 1 & 2 Vict. c. 110; and it cannot be supposed that this statute, in modifying the law of arrest, meant to deprive the party arrested of any right which he previously had. In Lush on The Act for the Abolition of Arrest, &c., pp. 5, 6, it seems to be understood that, even in the case of a *capias*, under stat. 1 & 2 Vict. c. 110, s. 3, the plaintiff may be nonprossed if he do not declare before the end of the first term after the service of the summons. The words of R. Trin. 3 W. 4, 5 B. & Ad. 467, are not indeed now strictly applicable: the judges were dealing with the law of arrest as it then existed: perhaps a new rule may be required to meet this case.

\*554] \*Lord DENMAN, C. J. It appears to me that the defendant is not entitled to be discharged: he is not under custody on process in the cause.

PATTESON, J. The words of R. Trin. 3 W. 4, 5 B. & Ad. 467, are "the plaintiff in *such* process," and "discharged from *such* arrest or detainer, upon entering an appearance according to the form set forth in the statute 2 W. 4, c. 39." All that is now repealed by stat. 1 & 2 Vict. c. 110. It does not appear to me that any new rule need be framed. Such a provision as that in R. Trin. 3 W. 4, 5 B. & Ad. 467, might be necessary when any man might arrest if the debt were sufficiently large, but not now, when there can be no arrest unless a judge be satisfied that the defendant means to leave the country.

WIGHTMAN, J.(a) I am of the same opinion. The rule applied only to custody upon process under stat. 2 & 3 W. 4, c. 39. The *capias* is now entirely collateral to the action. Rule discharged.

(a) Coleridge, J., was absent.

\*555] \*The QUEEN v. The Lord Mayor of LONDON.

A party charged before a magistrate with an offence is entitled to copies of the depositions under stat 6 & 7 W. 4, c. 114, s. 3, when he is finally committed or held to bail for the purpose of trial; but not on his being remanded for further examination.

A magistrate committing for re-examination ought at each examination to subscribe the depositions then taken, (the witnesses having first signed,) and not to defer the subscription by himself and the witnesses till he determines upon committing.

A *RULE nisi* was obtained in this term for a mandamus commanding the lord mayor of London to deliver to Joshua Fletcher copies of the examinations of the witnesses respectively upon whose depositions he had been from time to time, and then was, committed to prison.

It appeared by the affidavits that on December 9th, 1843, William Henry Barber was examined before the lord mayor on the charge of having

forged the will of one Emma Slack; that, after two witnesses had been called for the prosecution, Joshua Fletcher was called and examined as a witness for the defendant; and that, by the facts disclosed on his examination and those of other witnesses, the lord mayor was induced to believe that Fletcher was an accessory before the fact, and committed him and Barber to the custody of the keeper of Giltspur street Compter, (where prisoners under examination are usually detained until their final examination and commitment to Newgate for trial,) with directions on the warrant (in the usual form) to bring them before the lord mayor for further examination on December 16th, when the prosecutors expected to be able to adduce further evidence. Fletcher was again brought up on that day; when more witnesses were examined, and he was remanded till the 28th. He was then again brought before the lord mayor, and remanded till January 9th, several other witnesses having been examined. On that day he was again brought up, and \*other witnesses examined; and he was recommitted to the same prison, to be brought before the lord mayor again on the 22d. The defendant's attorney stated on affidavit that all the examinations were taken in writing, by and before the lord mayor as a magistrate and justice of the peace, and were, as the deponent believed, in the custody of the lord mayor or his officers; that application for copies had been made on Fletcher's behalf to the lord mayor on December 16th, and upon and after January 9th; and that his attorney had offered to pay for the copies, pursuant to the statute, 6 & 7 W. 4, c. 114, s 3;(a) but the lord mayor had refused to grant them. And the deponent further stated "that, in order fully and properly to instruct counsel to attend on each of the aforesaid examinations, it was, and, so far as may relate to such examinations as may hereafter take place, it is, in the judgment and belief of this deponent, material and necessary for the said Joshua Fletcher to have furnished to him, or to this deponent as his attorney, copies of the examinations" of such \*witnesses as from time to time had been or should be sworn to give, and had given or should give evidence, [556] [557]

(a) Stat. 6 & 7 W. 4, c. 114, s. 3, enacts, "That all persons who after the passing of this act shall be held to bail or committed to prison for any offence against the law shall be entitled to require and have, on demand, (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same,) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding," &c. "Provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged."

on which Fletcher had been, or should be, committed to prison. The affidavit finally stated that it was admitted, on the last examination before the lord mayor, that copies of the examinations had been furnished to the solicitors for the prosecution.

The chief clerk to the lord mayor, in his affidavit used on showing cause, stated as follows. "That he reduced into writing the evidence of the several witnesses examined at the hearing on the 9th day of December in the presence and hearing of the said William Henry Barber; but, as they were examined before the said Joshua Fletcher was charged with the offence, this deponent cannot say whether he, the said J. Fletcher, was present during their examination. And this deponent further saith that it is scarcely possible for him to write out voluminous depositions at the time of the examination with the clearness and accuracy requisite to return them to the sessions; and it is therefore the practice of himself and the chief clerks of other offices, as he has been informed and believes, in such cases, when there is a remand, to fair copy the depositions and to read them over in the presence and hearing of the accused, and the witnesses are then resworn, and sign the same in the presence of the magistrate before he finally commits the prisoner for trial. And this deponent further saith that the said W. H. Barber and J. Fletcher have been brought before the lord mayor for re-examination upon several occasions when various witnesses have been in their presence and hearing examined on the part of the prosecution. And this deponent further saith that the whole  
 \*558] of such examinations were taken by him in writing at \*great length at the time in his book, and they have been since fair copied in the form of depositions; but they have not yet been read over to, nor have they been signed by, the several witnesses in the presence of the prisoners; which will be done in case the lord mayor shall think proper to commit them to Newgate for trial. And this deponent further saith that, when application was made on behalf of the said J. Fletcher for copies of the depositions, the lord mayor, by the advice of this deponent, determined that, in their necessarily incomplete state, and before they had been read over and signed by the witnesses in the presence of the prisoners, the said J. Fletcher was not entitled to demand copies; and he therefore refused the same." He further stated that the practice of several of the metropolitan police offices (as he was informed) agreed with his; and he added "that copies of the depositions are made ready to be delivered to the said J. Fletcher so soon as they shall have been read over and signed by the deponents in the presence of the said J. Fletcher and the other prisoner prior to their commitment for trial, if the lord mayor shall determine to commit them."

The warrant of commitment by the lord mayor, under which Fletcher was in custody when this application was made, stated the nature of the charge, and required the keeper of Giltspur street prison to keep Barber

and Fletcher until January 22d, then to be brought before the lord mayor, or such other justice, &c., for further examination.(a)

\*Sir *F. Pollock*, attorney-general, and *R. V. Richards*, now showed cause. The material question is, whether stat. 6 & 7 W. 4, c. 114, s. 3, applies to all stages of the prosecution, before trial, and entitles the defendant to copies of the depositions as fast as they are made. The act gives this privilege only to persons "held to bail or committed to prison for any offence." Here the committal is for further examination. The object of the provision is to assist the party on his trial; this appears from the title; "An act for enabling persons indicted of felony to make their defence by counsel or attorney;" and by the provision in sect. 3, in case the demand of copies be not made "before the day appointed for the commencement of the assize or sessions." The depositions should be given when they can be furnished in a perfect state, and not before; obvious inconvenience might arise if they could be called for from time to time during the preliminary inquiry. Stat. 7 G. 4, c. 64, s. 2, directs that the justices of peace, before they bail or commit any person arrested for felony, shall take his examination, and the information upon oath of those who know the facts, and put the same, or as much thereof as shall be material, into writing; and \*shall "subscribe all such examinations, informations," &c., "and deliver or cause the same to be delivered [\*559  
[\*560  
to the proper officer of the court in which the trial is to be, before or at the opening of the court." Taking the two statutes together, it seems to be contemplated that the depositions should be completed and sent to the proper officer under stat. 7 G. 4, c. 64, s. 2, and that the defendant should then receive the transcript from the persons so having the "lawful custody:" or at least that the whole depositions should be ready for transmission to the officer, before the defendant calls for them.

*Kelly* and *Ballantine*, contra. There is nothing in the words of stat. 6 & 7 W. 4, c. 114, to limit this remedy in the manner contended for. The preamble, "Whereas it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," applies no less to pro-

(a) The warrant was as follows.

"To all and every the constables of the police force for the city of London," &c., "and to the keeper of the Giltspur street prison.

"London to wit.—These are in her majesty's name to command you and every of you forthwith safely to convey and deliver into the custody of the said keeper the bodies of William Henry Barber, and Joshua Fletcher, they being charged before me, one of her majesty's justices," &c., "by the oath of Ann Slack and others, with feloniously forging and uttering a certain testamentary writing, purporting to be the last will and testament of the said Ann Slack, with intent to defraud our lady the queen, against the statute and peace; whom you the said keeper are hereby required to receive, and them in your custody safely keep until Monday, the 22d instant, and then to be brought before me, or such other of her majesty's justices of the peace as shall be then sitting at the justice room, mansion-house, in the said city, for further examination. And for your so doing this shall be to you and each of you a sufficient warrant. Given," &c., "this 9th day of January, 1844.  
W. Magnay, Mayor."

ceedings before justices than to the ulterior ones. A man is as much put upon his defence when charged before the justice as afterwards ; and the opportunity of making such defence effectually in this stage of the proceedings is the more important, as, according to modern practice, the preliminary inquiry may be continued for many weeks. The words of sect. 3, "all persons" "committed," apply as well to the case of one committed from the 1st to the 10th of the month, as of one who is so from the 10th to the day of trial. The warrant differs from a warrant of commitment for trial only in the part which directs the party to be brought up for further examination. The expression, to "commit," is constantly used with reference to a committal for further examination ; as in \*561] \*2 Hale's P. C. 120, part 2, c. 14, (where it is said that the prisoner may be "committed to some near safe place of custody, till the examinations can be taken,") and the judgments of this court in *Davis v. Capper*, 10 B. & C. 28. It would be properly returned to a habeas corpus, that the prisoner was committed under the lord mayor's warrant for felony. The words in sect. 3, "held to bail or committed to prison for any offence," do not necessarily imply a final holding to bail or committing for trial. Bail is taken where parties are to be re-examined ; and a prisoner finally committed is committed only on suspicion. That committal is for an offence in the same sense only as the committal for further examination. As to the objection stated in the affidavit on showing cause, that the examinations are not yet made up and signed, that is in itself a matter of complaint. The examinations ought to be signed from time to time as they are taken, so that, if any addition is made afterwards, it may appear that the new matter was added after the original deposition was finished. Any suggestion that an ill use might be made of the examinations before the trial would apply equally to the privilege, which is not questioned, of having them as soon as the party is committed. It appears on affidavit that the prosecutors have obtained copies of the depositions.

Lord DENMAN, C. J. This rule must be discharged. The preamble of stat. 6 & 7 W. 4, c. 114, clearly confines the purposes of the act to the trial of the accused party. The recital, "Whereas it is just," &c., does \*562] not mean that the justices should have power to try, on "hearing both sides, whether the accused person is guilty or not. The legislature never intended to give them such an authority ; and it would be extremely mischievous if they were taught to think that they possessed it. As to the "person" "having the lawful custody" of the examinations, perhaps any person in whose hands they properly were might answer that description, if the demand of them were in accordance with the statute. A doubt arose in my mind from the words "committed to prison for any offence." The commitment here is not "for any offence." A distinction is constantly made between cases in which the commitment is for the offence and those in which the determination is suspended and the party committed in the mean time. Here the magistrate must be taken to have retained the

power of saying that, although enough appeared to authorize remanding, there was not ultimately enough to warrant him in committing. In the interval, this application is made.

PATTESON, J. The preamble of the act is against this application. The enactment in sect. 1, as to counsel, relates to the trial only. But I found my judgment entirely on this, that a prisoner is not committed for the offence till he is committed for trial. Until that time he is committed only for further examination.

COLERIDGE, J. This is an important question, for, if the construction given to the act on behalf of the defendant be correct, the magistrate has no discretion, but must give copies of the examinations as they proceed, whatever number of persons, in or out of custody, may be implicated, and however prejudicial the proceeding \*may be to the purposes of justice. The preamble and title of the act seem clearly applicable to the first two sections. "Full answer and defence" are well known expressions, and apply to a trial in court, which is directly contemplated in the provision for defence by counsel in sect. 1. The introductory parts of the act, therefore, do not support the present rule. It must be grounded on sect. 3; and the question on that clause is, whether the party applying is at this time committed to prison "for any offence;" and I think he is not. The person who comes within sect. 3 is entitled to copies of the examinations "on demand;" and this is referred to by the words "such demand" in the subsequent part of the clause, which relates expressly to a demand for the purpose of trial at the assizes or sessions. And, if the privilege of demand is not confined to the case in which there is to be a trial, but arises equally whether the accused party be committed or not, may it not be said that the magistrate, even if he ultimately dismisses the charge, is bound to give copies of the depositions? [\*563]

WIGHTMAN, J. This motion was first made before me; and I held the same opinion I entertain now: but I thought the case fit for discussion in this court, on account of its importance. The preamble and title of the act refer directly to a defence on trial. Sect. 3 gives additional advantages to those announced before: the words do not expressly apply to the case in which a trial is to take place; but, considering the title and preamble, and the proviso of sect. 3, I think that case must be contemplated. And committal for re-examination is not committal for an offence, but for further inquiry into the charge.

\*Lord DENMAN, C. J. We do not at all proceed upon the want of signature to the examinations. It is the magistrate's duty to sign every deposition (the witness having first signed it) as the proceedings go on. [\*564]  
Rule discharged.

## Ex parte DAVIES.

A duly admitted attorney of one of the courts of great sessions in Wales, who was practising as such at the time of the passing of stat. 11 G. 4, & 1 W. 4, c. 79, and is enrolled on the shilling roll under that act, sect. 16, and practises accordingly in the superior courts at Westminster in actions against persons residing, at the commencement of the suit, within the principality, is a "practising attorney or solicitor in England or Wales," within stat. 6 & 7 Vict. c. 73, s. 3. And a person, who, since that act came into operation, has been articled to such attorney as a clerk, and has paid the higher duty on his articles of clerkship, under stat. 55 G. 3, c. 184, sched. Part. I., in order to admission as an attorney in the courts at Westminster, is entitled to have an affidavit made and filed, and the articles of clerkship registered, according to stat. 6 & 7 Vict. c. 73, s. 8.

E. V. WILLIAMS, in Michaelmas term last, obtained a rule calling upon the incorporated law society to show cause why Mr. William Rees, a practising attorney in Wales, should not make an affidavit stating that he was duly admitted an attorney of the court of great sessions in Wales, 6th April, 1830, and was practising in the said court as an attorney at the time of the passing of stat. 11 G. 4, & 1 W. 4, c. 70, and that his name was duly entered upon the roll of the Court of Queen's Bench pursuant to sect. 16 of that act; and also stating the actual execution of a contract, being articles of clerkship, dated 28th October, 1843, made between the said William Rees and William Davies, and their places of abode respectively, together with the day on which, &c.; and why it should not be deemed a sufficient compliance with stat. 6 & 7 Vict. c. 73, s. 8; and why the master should not enrol and register the contract, and file the  
 \*565] affidavit, and make and sign a memorandum of the day of such affidavit upon such affidavit, and also upon the contract.

The affidavit on which the rule was obtained stated that William Rees, of, &c., was duly admitted an attorney of the court of great sessions in Wales, 6th April, 1830, and was, on 23d July, 1830, practising as an attorney in the said court; and that his name was, on 14th November, 1830, duly entered upon the roll of the Court of Queen's Bench at Westminster, pursuant to stat. 11 G. 4, & 1 W. 4, c. 70, s. 16. That, by articles of agreement, dated 28th October, 1843, and made between the said William Rees of the one part and William Davies of the other part, the said W. Davies, for the consideration therein mentioned, did put, place, and bind himself clerk to the said W. Rees, to serve him in the profession of an attorney at law and solicitor in chancery from the day of the date of said articles, for the term of five years thence next ensuing. That the said articles were executed by the said W. Rees and W. Davies respectively, 28th October, 1843. That doubts had arisen whether W. Rees, not having been admitted an attorney of the Court of Queen's Bench, though his name was duly entered on the roll kept for that purpose pursuant to the said sixteenth section, &c., and though he had been at the time of the passing of the said act admitted in, and was at the time of the

passing of the said act practising as an attorney of, the said court of great sessions, could legally take an articled clerk, and could make the affidavit required by stat. 6 & 7 Vict. c. 73, s. 8. And that the said W. Rees was on 28th October last, and is now, a practising attorney in Wales.

\*Sir *F. Pollock*, attorney-general, and *F. Robinson* now showed cause. This is an application, under the recent act for the amendment of the laws relating to attorneys, on behalf of a clerk articled to an attorney practising in Wales only, to have the necessary affidavit of his master having been duly admitted an attorney, and of the contract to serve having been duly executed.<sup>(a)</sup> The act \*contains a special provision as to practising attorneys of the courts of the counties palatine of Lancaster and Durham, but none as to attorneys practising in the court of great sessions in Wales: and the substantial question for the decision of this court is, whether an attorney, who under the authority of stat. 11 G. 4, & 1 W. 4, c. 70, continues to practise in Wales, is "a practising attorney or solicitor in England or Wales" within stat. 6 & 7 Vict. c. 73, s. 3. By stat. 11 G. 4, & 1 W. 4, c. 70, s. 16, all persons

(a) Stat. 6 & 7 Vict. c. 73, "For consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales," enacts, by sect. 3, "that, except as hereinafter mentioned, no person shall, from and after the passing of this act, be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall, after the expiration of the said term of five years, have been examined and sworn in the manner hereinafter directed: provided always, that any person who now is or shall hereafter be bound by contract in writing to serve as clerk to a practising attorney or solicitor of the Court of Common Pleas of the county palatine of Lancaster or the court of pleas of the county palatine of Durham respectively for the term of five years, and shall continue in such service for and during the said term, and shall during the whole of such term have been actually employed by such attorney or solicitor, or by the London agent of any such attorney or solicitor, or by any practising barrister or special pleader, with the consent of such attorney or solicitor, for any part of the said term not exceeding one year, shall be admitted and enrolled an attorney of the said last mentioned courts respectively as heretofore, on his satisfying the judges for the time being of the said courts respectively of his being qualified to act as an attorney or solicitor."

Sect. 8 enacts: "That whenever any person shall after the passing of this act be bound by contract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor to whom such person shall be so bound as aforesaid shall, within six months after the date of every such contract, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor and by the person so to be bound to serve him as a clerk as aforesaid; and in every such affidavit shall be specified the names of every such attorney or solicitor and of every such person so bound, and their places of abode respectively, together with the day on which such contract was actually executed; and every such affidavit shall be filed within six months next after the execution of the said contract with and by the officer appointed or to be appointed for that purpose as hereinafter mentioned, who shall thereupon enrol and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit and also upon the said contract."

who on or before the passing of the act had been admitted as attorneys, and were then practising in the courts of great sessions in Wales, are entitled, upon the payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior courts of Westminster, and thereupon be allowed to practise in such courts in all actions and suits against persons residing at the commencement of the suit within the principality of Wales; and all persons having served or then actually serving as clerks to such attorneys under articles, and who would otherwise be entitled to be admitted as attorneys of the court of great sessions, might, on or before the expiration of six months after the passing of the act, be admitted as attorneys of the said courts at Westminster for the purpose of practising there, in the like matters only, without payment of any

\*568] greater duty than would \*be then payable by law upon their admission as attorneys of such courts of great sessions. By sect. 17 attorneys of the court of great sessions may be admitted as attorneys of the courts at Westminster, on payment of the difference of duty; and all persons having served, or then actually serving, under articles as clerks to such attorneys of the courts of sessions or great sessions may, at the expiration of their respective times of service, be admitted as attorneys of the courts at Westminster, in like manner and upon payment of the like duty as if they had served under articles as clerks to attorneys of the last mentioned courts. Mr. Rees is an attorney on the shilling roll, and, as such, practises as an officer of this court in the limited manner authorized by sect. 16; the question is whether these old attorneys of the court of great sessions, being only limited officers of this court, are to have more extensive powers as to qualifying their articulated clerks than are reserved for the attorneys of the counties palatine of Lancaster and Durham by stat. 6 & 7 Vict. c. 73, s. 3. [PATTESON, J. Stat. 11 G. 4, & 1 W. 4, c. 70, ss. 16, 17, makes provisions as to persons "having served or now actually serving" as articulated clerks. Do you contend that the operation of that act and the recent statute is to prevent an attorney on the shilling roll from qualifying a clerk at all?] Unless he has some general right under stat. 2 G. 2, c. 23, that will be so. The courts of sessions and great sessions are abolished: certain persons who were formerly attorneys of those courts may practise in a limited way, and confer certain privileges and qualifications on persons who, when stat. 11 G. 4, & 1 W. 4, c. 70, passed, had served or were serving as their articulated clerks: but the act contains

\*569] no similar provisions as to future clerks. The \*words in stat. 6 & 7 Vict. c. 73, s. 3, "practising attorney or solicitor in England or Wales," must be construed with some limitations; otherwise they will include attorneys of local courts: and the limitation which seems reasonable is to construe the word "attorney" as meaning an attorney admitted of one of the superior courts at Westminster. This construction is borne out by the circumstance that the legislature found it necessary to insert the saving clause as to attorneys of the counties palatine: and, if it had

not been in contemplation that stat. 11 G. 4, & 1 W. 4, c. 70, would have a similar incapacitating effect, sect. 17 of that act would have been unnecessary.

But it will be contended that the legislature has mistaken the state of the law as it existed at the time of the passing of the last mentioned act; and reliance will be placed on stat. 2 G. 2, c. 23.(a) That act, sect. 1, excluded persons from acting as attorneys in the Courts of King's Bench, Common Pleas, or Exchequer, or the Duchy of Lancaster, or in any of the courts of great sessions in Wales, or in any of the courts of the counties, palatine of Chester, Lancaster and Durham, or any other court of record in England, wherein attorneys had been accustomably admitted and sworn, unless such person should take the oath, &c., and should also be admitted and enrolled in such of the said courts where he should act as an attorney: and by sect. 5, it was enacted that no person, who had not been sworn, admitted and enrolled before a specified day, should be permitted to act as an attorney, unless, amongst other qualifications, such person should "have been bound, by contract in writing, \*to serve as a clerk for and during the space of five years, to an attorney duly and legally sworn and admitted, as hereinbefore is directed, in some or one of the courts hereinbefore mentioned." It must be admitted that, if this enactment be construed literally, clerkship with an attorney of any one of the courts mentioned in the first section would have entitled the clerk to be admitted in all or any of the courts. But, whatever might be the case at the time when that act was passed, and when no stamp duties were charged on articles of clerkship, the imposition of a variable scale of stamp duties introduced a material distinction. The act 34 G. 3, c. 14, by sect. 1, imposed upon such articles a duty of one hundred pounds where the binding was in order to admission as an attorney in any of his majesty's courts at Westminster, and only fifty pounds where the binding was in order to admission as an attorney in any of the courts of great sessions in Wales, or certain other courts; a proportion preserved by all subsequent acts charging stamp duties on articles of clerkship.(b) By stat. 9 G. 4, c. 49, s. 4, the commissioners of stamps were authorized, whenever thereto required, and although six months should have elapsed from the date of the articles, upon payment of the larger stamp duty, to stamp the articles if previously stamped with a stamp denoting the payment of the lower duty, under which any person might have served or become bound to serve as a clerk in order to his admission in any of the courts of great sessions in Wales, or the said other courts; and thereupon the person having so served was to be capable of being \*admitted an attorney or solicitor, in any one or more of his majesty's courts at Westminster. This might be done without the payment of any penalty:

(a) Made perpetual by stat. 30 G. 2, c. 19, s. 75.

(b) Stats. 44 G. 3, c. 98, sched. (A.) 48 G. 3, c. 149, sched. Part I., 55 G. 3, c. 184 sched. Part I.

but it does not follow that it might previously have been done upon the payment of a penalty; stat. 11 G. 4, & 1 W. 4, c. 70, s. 17, is inconsistent with that view; for it confers the same privilege, but confines it specifically to persons having served or then actually serving.

Sir *W. W. Follett*, solicitor-general, *Chilton* and *E. V. Williams*, contra. Mr. Rees falls within the literal meaning of the expression, "practising attorney or solicitor in England or Wales:" and the special provision as to Lancaster and Durham shows that, as regards Wales, the enactment is not to receive a limited construction. The difficulty, if there be one, arises rather from the expression "duly admitted," in sect. 8: it is not added "of the courts at Westminster." Mr. Rees was duly admitted of the court of great sessions; and he is duly entered on the shilling roll as an attorney entitled to practise in Wales: if, on his making an affidavit according to the facts, the court should hold him not to be a person with whom a clerkship can be served so as to qualify the clerk to be admitted an attorney of the courts at Westminster, it will follow that an attorney on the shilling roll cannot take a clerk at all. It is clear that, under stat. 2 G. 2, c. 23, ss. 1, 5, clerks articulated to attorneys of the courts of the principality were entitled, if in other respects duly qualified, to be admitted attorneys of the courts at Westminster: and, when fiscal regulations had caused certain distinctions, the right was qualified to this extent only, that  
 \*572] no person could be admitted of the courts at Westminster \*without payment of the higher duty. It may be conceded that, in the Welsh Judicature Act, 11 G. 4, & 1 W. 4, c. 70, s. 17, the legislature overlooked the remedy which already existed under stat. 9 G. 4, c. 49, s. 4: but the last mentioned enactment is a clear recognition of the fact that the distinction between the attorneys of the Welsh courts and those of the English courts is purely fiscal.<sup>(a)</sup> The Welsh Judicature Act gives the Welsh attorney the option of becoming an attorney of the English courts, without any limitation, on the payment of certain duties, or of remaining on his old footing, on payment of a shilling. But he is not on the same footing if he cannot take a clerk. He cannot take one at the lower duty, because, the court of great sessions having been abolished, the clerk cannot now be bound in order to his admission as an attorney at that court. And, without reference to the Welsh Judicature Act, a person might have been bound to an attorney of the court of great sessions, paying the higher duty in order to his admission as an attorney of the courts of Westmin-

(a) It seems that, under stat. 9 G. 4, c. 49, s. 4, the clerk to the Welsh attorney must have paid 120*l.* in addition to the previous stamp duty, whilst under stat. 11 G. 4, & 1 W. 4, c. 70, s. 17, he, at the most, would have only to make up the difference. But, if sects. 16, 17 are to be taken literally, the duties there mentioned are not the duties on the articles of clerkship but those on the admission of attorneys, which are the same, 25*l.* in all the courts in question, and an attorney of the court of great sessions, or the courts of the counties palatine, is exempted from the payment of that and all other stamp duties, on his being admitted an attorney of the courts at Westminster. See stat. 55 G. 3, c. 184, sched. Part I. Admission.

ster, and was entitled to be admitted an attorney of those courts in respect of his service under such articles; *Ex parte Williams*, 5 A. & E. 140. In \*the present case the applicant has paid the higher duty.(a) [\*573]

LORD DENMAN, C. J. I am of opinion that this may be done.

PATTESON, J. In my opinion this rule must be made absolute. Before the revenue laws created a distinction between the two classes of attorneys, articles to an attorney "in some or one of the courts hereinbefore mentioned,"(b) of which any court of great sessions in Wales is one, qualified the clerk who duly served under them to be admitted an attorney of any of the courts. The charging of a double duty upon bindings in order to admission in the superior courts introduced a difficulty, where the clerk, after paying the lower duty, wished to be admitted in the superior courts: that difficulty, however, is provided for by stat. 9 G. 4, c. 49, s. 4, which is not repealed by stat. 6 & 7 Vict. c. 73, but still applies to the counties palatine of Lancaster and Durham; and, even as to the courts of great sessions in Wales, which are abolished by the Welsh Judicature Act, such clerks to attorneys in those courts as were, at the passing of the act, under articles that had more than six months to run were, by a little inadvertence, left to the remedy provided by stat. 9 G. 4, c. 49, s. 4. The latter part of stat. 11 G. 4, & 1 W. 4, c. 70, s. 17, seems at first sight to be stat. 9 G. 4, c. 49, s. 4, over again; but, as the enactment last mentioned only authorizes the imposition of the higher stamp, a doubt may have arisen as to the validity of a service under \*such articles; and the clause may have been inserted out of caution. As regards the [\*574] present act, 6 & 7 Viet. c. 73, s. 3, I can see no reason why an attorney on the shilling roll should not be permitted to take an articulated clerk: but, the courts of great sessions having been abolished, he cannot do so except upon the payment of the higher duty as upon a binding in order to the admission of the clerk as an attorney of the courts at Westminster.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule absolute.

(a) This was not disputed.

(b) Stat. 2 G. 3, c. 23, s. 5.

### LOBB and KNIGHT v. STANLEY.

On an issue whether defendant, a certificated bankrupt, had given a written promise signed by him after his bankruptcy, so as, under stat. 6 G. 4, c. 16, s. 131, to revive a claim barred by the certificate, the following letter was produced, written by him. Mr. Stanley begs to inform" the plaintiffs "that he will take an early opportunity of settling their account: but Mr. Stanley objects to give his bill. Mr. Stanley regrets that he has been prevented from answering" the plaintiffs' "letter before. Crescent. Saturday." Evidence of the amount due was given.

1. *Held*, that the letter was sufficiently signed.
2. Admitted, that parol evidence might be given of the time at which it was written.
3. *Held* a sufficient promise, notice having been given to the defendant to produce the letter of the plaintiffs referred to, which had not been done.

Though two other letters, written by defendant about the same time, were produced by the plaintiffs, in one of which defendant, referring to some request of plaintiffs, promised to discharge plaintiff's account as soon as he could, and in the other said he would give a promissory note; and it did not appear in what order of time the three were written.

**ASSUMPSIT** for goods sold and delivered, and on an account stated.

The defendant pleaded his bankruptcy and certificate, the fiat being laid (under a scilicet) on 17th July, 1841; and that the causes of action accrued before he became a bankrupt.

Replication. That, after the making of the promises in the declaration mentioned, and after defendant \*became bankrupt as in the plea \*575] mentioned, and before the commencement of this suit, to wit 4th June, 1842, defendant, in writing signed by him, assented to, and then ratified and confirmed, the said promises in the declaration mentioned, and then promised plaintiffs to pay them the said sums of money therein also mentioned. Verification.

Rejoinder traversing the ratification. Issue thereon.

On the trial, before lord DENMAN, C. J., at the London sittings after last term, proof of the amount due was given: and the plaintiffs gave parol evidence to show that three letters, which they produced, were written after the defendant's bankruptcy, and were in his handwriting; and that verbal applications for payment had been made about the same time. No evidence was, however, given as to the exact dates, nor as to the order in which the letters were written. They were put in, and read in the following order.

(1.)

"Mr. Stanley cannot comply with the request of Messrs. Lobb and Co., but will discharge their account as soon as he possibly can.

"Friday."

(2.)

"Mr. Stanley begs to inform Mr. Lobb that he will be glad to give him a promissory note or bill for the amount of Mr. Stanley's account, payable at three months, as Mr. Stanley has of late been put to heavy expenses, and hopes this arrangement will be satisfactory to Mr. Lobb.

"3 Crescent. Thursday Morning."

\*(3.)

\*576] "Mr. Stanley begs to inform Messrs. Lobb and Co. that he will take an early opportunity of settling their account: but Mr. Stanley objects to give his bill. Mr. Stanley regrets that he has been prevented from answering Messrs. Lobb and Co.'s letter before.

"Crescent. Saturday."

There were no dates or signatures to the letters, except as above. Notice had been given to produce the letter of the plaintiffs; but none was produced. The defendant's counsel contended that the issue was not proved by the plaintiffs, the letters not being signed or dated, and con-

taining no explicit promise. A verdict was taken for the plaintiffs, and leave given to move for a nonsuit. In this term *Whateley* obtained a rule accordingly.

*Thesiger* and *Ogle* now showed cause. The question arises under stat. 6 G. 4, c. 16, s. 131, which protects a certificated bankrupt from liability to satisfy debts, &c., discharged by the certificate, "upon any contract, promise or agreement made or to be made after the suing out of the commission, unless such promise, contract or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt." Now the words of the statute of frauds, 29 C. 2, c. 3, in sect. 4, are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" and, in sect. 17, "that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereto lawfully authorized." There is no difference, so far as regards the present question, between the enactments of the two statutes, and therefore the decisions upon one will apply to the other. One case on stat. 6 G. 4, c. 16, s. 131, *Hubert v. Moreau*, 2 C. & P. 528, (in banc, 12 B. Moore, 216,) was cited on the motion for this rule. The defendant there wrote the letter with his own hand, adding "something that looked like an M.;" and *BEST*, C. J., said, "If it be an M., I am of opinion that it is not sufficient, as the statute requires that the promise should be signed." And he expressed a strong opinion that parol evidence could not be given of the time of writing a letter which had no date. A motion was afterwards made for a verdict for the plaintiff, or a new trial; but the Court of Common Pleas refused the rule, on the ground that there was no signature. There was some doubt whether the mark made really was an M.; and, at any rate, it was merely the initial of the defendant's surname: the court seems to have thought that no signature was intended. But here the name is inserted in the defendant's handwriting, in the body of the letter, for the direct purpose of authenticating the document. And the time may clearly be supplied by parol evidence. That was decided under the statute of limitations, 9 G. 4, c. 14, s. 1, in *Edmunds v. Downes*, 2 C. & M. 459. (a) *Hartley v. Wharton*, 11 A. & E. 934, on sect. 5 of that statute, is to the same effect. As to the signature: in *Knight v. Crockford*, 1 Esp. N. P. C. 190, a letter beginning "I, James Crockford, agree to sell" was held to be sufficiently signed under sect. 4 of the statute of frauds. Under sect. 5 of the same statute, which requires that devises of lands "be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express

(a) 8. C. 4 Tyrwh. 173, where Bayley, B., is reported to have said that the point, as to evidence of the date, was "at least doubtful."

directions," it was held that the following words in the beginning of a devise, "I, John Stanley, make this my last will and testament," written by the deviser himself, were sufficient; *Lamayne v. Stanley*, 3 Lev. 1. In *Saunderson v. Jackson*, 2 B. & P. 238, Lord ELDON clearly was disposed to adhere to the doctrine of *Knight v. Crockford*, 1 Esp. N. P. C. 190, though he considered that in that case "the paper was meant to be incomplete until it was further signed." It is true that, in the case before him, (which arose under sect. 17 of the statute of frauds,) where the name had been printed according to the party's habit, he preferred resting his decision on the fact that the signature was authenticated by a subsequent letter; so that perhaps the actual decision in *Saunderson v. Jackson*, 2 B. & P. 238, cannot here be relied upon as a direct authority. *Johnson v. Dodgson*, 2 M. & W. 653, was also a case under the 17th section of the statute of frauds. There the buyer, John Dodgson, wrote in his own book, "sold John Dodgson," &c., which was signed by the vendor's agent; and this was held sufficient. On the other hand, in *Hubert v. Treherne*, 3 M. & G. 743, where an agreement, not shown to be written by the defendants, contained their names in the body, but ended "As witness our hands," with nothing more, it was held that this was never  
 \*579] intended to be sent forth as the complete agreement of the parties, and that sect. 4 of the statute of frauds was not satisfied. Here there can be no doubt that the letters were meant to be complete. Under sect. 4, it was considered (though not expressly decided) by EYRE, B., that the mere introduction by a party of his name into a document written by him would not be sufficient, if the name was introduced, not to give authenticity, but to make clear some particular term of the agreement; *Stokes v. Moore*, 1 Cox, 219. That case was referred to in *Ogilvie v. Foljambe*, 3 Mer. 53, where the defendant wrote a letter beginning, "Mr. Foljambe presents his compliments," &c., and it was held enough, under the same section, as having "the effect of authenticating the instrument." There, as here, the Christian name did not appear. Lastly, the letters contain a complete promise. They may all be taken together; *Dobell v. Hutchinson*, 3 A. & E. 355, where *Saunderson v. Jackson*, 2 B. & P. 238, was relied on. But the third letter alone is sufficient; and the others may be left out of consideration.

*Whateley*, contra. The authorities certainly show that the insertion of the name here would be a sufficient signature under the Statute of Frauds or Lord Tenterden's Statute of Limitations. Those decisions, however, are scarcely to be defended on principle; and, if the question were new, probably a different doctrine would be adopted. The court will not, in the case of a different statute, apply so questionable a rule. The courts have been reluctant to extend the decisions on sects. 4 and 17 of the  
 \*580] Statute of Frauds; as in *Right, Lessee of Cater, v. Price*, 1 Doug. 241. In *Selby v. Selby*, 3 Mer. 2, Sir WILLIAM GRANT,

M. R., decided that there must be an actual signature, under sect. 4 of the Statute of Frauds, and that mere authentication was not enough; and he held a letter written by a party who merely subscribed, "Believe me the most affectionate of mothers," insufficient without a name. The late Statute of Wills, 7 W. 4, & 1 Vict. c. 26, s. 9, probably to get rid of the niceties by which the Statute of Frauds has been evaded, requires the will to be "signed at the foot or end thereof." The only decision on the statute now under consideration is *Hubert v. Moreau*, 2 C. & P. 528, (in banc, 12 B. Moore, 216,) which has not been distinguished from the present case. The decision in *Hartley v. Wharton*, 11 A. & E. 934, was regretted, at the time, by COLERIDGE, J. *Stokes v. Moore*, 1 Cox, 219, shows that a mere casual introduction of the name is insufficient, even under the Statute of Frauds. In *Ogilvie v. Foljambe*, 3 Mer. 53, two documents were taken together, to make up the agreement required. As to the time with reference to the bankruptcy, it appears that the parol evidence removed the objection. Then, admitting the letters to be properly signed, they contain no promise. The third letter alone is relied upon. But that is in answer to a previous letter, of which no evidence was given; and the main object appears to be to refuse to give a bill. That cannot be treated as a direct unconditional promise: it makes part of a negotiation of which no more is shown. The promise, to revive a debt after bankruptcy, should be clear and unequivocal; *Brook v. Wood*, 13 Price, 667; *Fleming v. Hayne*, 1 Stark. N. P. 370.

\*Lord DENMAN, C. J. I can entertain no doubt that the third letter, if coupled with evidence of the amount, would have been alone sufficient to support this issue. It is written in answer to a letter which the defendant does not produce, though he has notice to produce. It states that the defendant will settle the account, and will not give a bill. That is a promise. There may be some doubt as to the effect of the other letters: they look, perhaps, rather like an incomplete negotiation: we cannot well give them effect without seeing the rest of the correspondence; but it is the defendant's fault that all does not appear. Then, as to the question whether the letters are signed: in one sense, they are not. But there can be no reason for construing stat. 6 G. 4, c. 16, s. 131, differently from Lord Tenterden's Act and the Statute of Frauds; and, under those statutes, it is a signature of the party when he authenticates the instrument by writing his name in the body. Here, it is true, the whole name is not written, but only "Mr. Stanley." I think more is not necessary. Is not the initial of the Christian name enough? May not one of two Christian names be omitted? Our decision does not contradict that in *Hubert v. Moreau*, 2 C. & P. 528, (in banc, 12 B. Moore, 216,) where, without the aid of extrinsic evidence, it did not appear that the name was written at all. [\*581]

PATTESON, J. I cannot see why a different construction should be put on stat. 6 G. 4, c. 16, s. 131, from that which is put on the Statute of Limi-

tations and the Statute of Frauds. The object of all the statutes is merely  
 \*582] to authenticate the genuineness of the document: \*and that is done  
 here as much as if the defendant had said "I promise," and had  
 subscribed his full name. It is true that the word "signed" occurs in the  
 statute: and, if this had been the first time that we were called upon to  
 put a construction on that word, and if the decisions on the Statute of  
 Frauds had not occurred, I should perhaps be slow to say that this was a  
 signature: but I cannot see how there can be different constructions in the  
 two cases. I had some doubt whether the letters amounted to a promise:  
 for it did not appear whether the letter relied upon was written first or  
 last, nor whether there were others, nor what negotiation had taken place.  
 That, however, is the fault of the party making the objection. The pro-  
 mise to take an early opportunity of settling the account would no doubt  
 be sufficient in an action upon an account stated: and it amounts to an  
 absolute unconditional promise.

COLERIDGE, J. I am of the same opinion. Two points are made. One  
 is very important, that upon the construction of stat. 6 G. 4, c. 16, s. 131.  
 On authority this point is clear enough: it is admitted that the signature  
 would be sufficient to satisfy the Statute of Frauds; and no clear distinc-  
 tion can be shown between the two statutes. I myself think that the cases  
 on the Statute of Frauds were well decided. Here the statute prescribes  
 that the writing shall be signed by the bankrupt: it is not required that  
 his name be subscribed. Is it not enough if a party, at the beginning of  
 a document, writes his name so as to govern what follows? Does he not  
 then use his name as a signature? As to the want of a Christian name,  
 the objection was little pressed. I have more doubt on the other point.

\*583] There were letters \*without a date; and it was left to the plain-  
 tiff's choice in what order they should be read: and it struck me  
 that the plaintiff was not entitled to determine the order: so that I felt  
 doubtful whether the whole had ended in a promise. As to this, how-  
 ever, I have changed my mind. There would be a request for payment,  
 and a negotiation respecting the giving a bill: but, in the course of this,  
 the defendant chooses to make an actual promise to pay: and that is not  
 the less a promise because a negotiation for something else is going on.

WIGHTMAN, J. I am of the same opinion on both points. As to the  
 first: the result of the cases is that, if a party insert his name, either at  
 the beginning or in the body of a document, for the purpose of authen-  
 ticating it, that is enough, and no other signature is wanted. As to the  
 second point, it seems to me that a promise to take an early opportunity  
 of settling the account is an unconditional promise, and that it is unim-  
 portant whether this letter was written before or after the others.

Rule discharged.

**\*HOLFORD v. JOHN HANKINSON and Another. [\*584**

A plea under stat. 2 & 3 W. 4, c. 71. ss. 2 and 5, alleging an easement enjoyed for twenty years, must state, in the words of sect. 5, that the enjoyment was had "as of right."

A plea stated that H., under whom defendants justify, was occupier of a close, and that he, while such occupier, and all other prior occupiers of the said close, for twenty years next before action brought, and before the times when, &c., "have had, used and actually enjoyed without interruption, and of right ought to have had," &c., and that H., at the times when, &c., of right ought to have had, &c., and still of right ought to have, &c., for himself, &c., occupiers of the said close, a certain way to pass, &c., as to the said close of H. with the appurtenances belonging and appertaining: which averment the plaintiff traversed.

After verdict for defendants on this issue: *Held*, on motion for judgment non obstante veredicto, that the plea was bad: and the court gave judgment accordingly.

**TRESPASS quare clausum fregit.**

Plea 5. As to certain of the trespasses, specified in the inducement: That, long before and at the times when, &c., one Robert Hankinson was and still is the occupier of a certain tenement and premises with the appurtenances, called, &c., "contiguous and next adjoining to the said close in which, &c., and that he the said R. H., whilst such occupier as aforesaid, and all other prior occupiers of the said last mentioned close, tenement and premises, for the full period of twenty years next before the commencement of this suit, and before either of the said times when, &c., have had, used, and actually enjoyed without interruption, and of right ought to have had, used, and actually enjoyed without interruption, and the said R. H., at the said several times when, &c., of right ought to have had, used, and actually enjoyed without interruption, and still of right ought to have, use, and actually enjoy without interruption, for himself and themselves and his and their servants, farmers and tenants, occupiers of the said close, tenement and premises with the appurtenances, a certain way to pass and repass on foot from a certain common highway in the parish," &c., "into, through, over and along the said close in which, &c., unto and into the said close, tenement and premises of the said R. H., and so from thence back again," &c., "at all times of the year, at his and their free will and pleasure, as to the said close, tenement and premises of the said R. H., with the appurtenances belonging and appertaining." Justification, stating user of the way by defendants as the servants of R. Hankinson and by his command, and acts lawfully done for the purpose of such user. Verification. [\*585

Replication. That the said Robert Hankinson and all other prior occupiers of the said close, tenement and premises in the said plea mentioned, for the full period of twenty years next before the commencement of this suit, did not have, use or actually enjoy the said way in the plea in that behalf mentioned, as to the said close, tenement and premises of the said R. H. with the appurtenances belonging and appertaining, in manner, &c.

Conclusion to the country. Issue thereon. Other issues in fact were joined.

On the trial, before COLTMAN, J., at the Liverpool Spring assizes, 1843, a verdict was found for the defendants on the issue arising out of the fifth plea, and for the plaintiff on all the others. *Knowles*, in Easter term, 1843, moved for a rule to show cause why judgment should not be entered for the plaintiff on the fifth issue, non obstante veredicto, or why a repleader should not be awarded; on the ground that the plea did not state the way to have been enjoyed "as of right," in the words of stat. 2 & 3 W. 4, c. 71, s. 5. He cited *Bright v. Walker*, 1 Cro., M. & R. 211; S. C., 4 Tyr. 502. A rule nisi was granted.

*Wortley* and *W. H. Watson* now showed cause. The Prescription Act, \*586] 2 & 3 W. 4, c. 71, s. 2, secures the \*title to certain easements, including rights of way, where they "shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years;" and then sect. 5 enacts that, where it had hitherto been necessary to claim the easement as having existed from time immemorial, "it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed," during the period applicable to the particular case under this act, without claiming in the name of the owner of the fee. The object of the clause is to render the allegation of enjoyment by the occupiers for the requisite period sufficient without making title through the tenant in fee; it was not intended to prescribe a form in which the words "as of right," should be indispensable. The plea in question follows the form used before the statute, only stating an enjoyment for twenty years instead of an immemorial enjoyment; and there is no reason that this mode of pleading should not be continued. The plea is, substantially, prescription, as before; the statute creates no new right, but only relieves juries from the duty of presuming a grant where those facts exist which, before, were always held to warrant that presumption; *Bright v. Walker*. 1 Cro., M. & R. 211, 217; S. C., 4 Tyr. 502, 507. That the precise words "as of right," have not invariably been deemed necessary, even since the statute, appears from 2 Chitty Jun. on Pleading, 778, note (o), and the cases there referred to. (a) [COLERIDGE, J. Would not the words of this \*587] plea be satisfied by proof of an \*enjoyment by mere favour?] The words "as to the said close, tenement and premises of the said Robert Hankinson with the appurtenances belonging and appertaining," are inconsistent with that supposition; and they refer to all that is previously said of the right. But, further, the question arises after verdict; and, as is laid down in *Jackson v. Pesked*, 1 M. & S. 234, "where a

(a) (*Jones v. Price*, 3 New Ca. 52; *Jones v. Richard*, 5 A. & E. 418. In the latter case the language of the second plea in bar is "have respectively, for and during," &c., "had, used, and actually enjoyed of right without interruption, and claimed of right common," &c.

matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict." In *Clark v. King*, 3 T. R. 147, a plea of prescription for common, in A. C. and all those whose estate he had, &c., was held good after verdict, though it did not allege the right to be immemorial. The objection here is that the title is defectively stated, not that a defective title is shown. If the words are ambiguous, the court, after verdict, will ascribe that sense to them which supports the verdict; *Avery v. Hoole*, 2 Cowp. 825; *Lord Huntingtower v. Gardiner*, 1 B. & C. 297. The plaintiff here has tendered issue upon the plea in the very terms in which it is framed. If the case be doubtful, judgment non obstante veredicto ought not to be given.

*Knowles* and *Tomlinson*, contra, were not heard.

LORD DENMAN, C. J. Stat. 2 & 3 W. 4, c. 71, s. 5, gives a new form of plea. Parties may still use the old form if they please; but, if they adopt the new, they \*must keep to it in all respects. It is quite possible that every thing alleged in this plea might be found true, yet the defence not made out. It is urged that the defect here amounts only to an ambiguity; but I think the allegation of the plea does not admit of the construction which the defendants rely upon. The language is more like that of persons lamenting that they have not the right pointed out by the act, than of persons asserting it. [\*588]

PATTESON, J. Sect. 5 gives a new plea. It enacts that, in the cases pointed out, it shall be sufficient to allege the enjoyment "as of right." If parties choose to avail themselves of that provision, they must follow the very words; and, if they neglect to do so, the plea is bad, and the omission would be ground of demurrer. I think the plea here is not ambiguous, but alleges a defective title, and is within the reason of the decision in *Jackson v. Pesked*, 1 M. & S. 234. The distinction, between a defective statement and the statement of a defective title, has been exemplified in *Davis v. Black*, 1 Q. B. 900. and *Rutter v. Chapman*, 8 M. & W. 1,

COLERIDGE, J. I think this is a statement of a defective title. Every thing might have been found by the jury as alleged, and yet there might have been no enjoyment as of right.(a)

Rule absolute for judgment non obstante veredicto.

(a) Wightman, J., was absent.

## \*589] \*In the Matter of GEORGE MILNER and WILLIAM MILNER.

A burgess is not an "officer" within stat. 6 & 7 Vict. c. 89, s. 5, and therefore cannot be called upon to show cause in the first instance why a quo warranto information should not issue against him for exercising the franchise.

JOSEPH ADDISON moved for an information in the nature of a quo warranto against these parties for claiming to be burgesses of Richmond in Yorkshire. The name of both had been retained on the burgess roll, though objected to, at the last revision. *Addison* contended that the information might be granted against the two jointly, under, stat. 9 Ann. c. 20, s. 4, this being a case in which the rights could properly be determined on one information; and he called upon the parties to show cause in the first instance under stat. 6 & 7 Vict. c. 89, s. 5.

*Knowles* (with whom was *Bliss*) appeared for the parties served with notice, and contended that they were not bound to show cause in the first instance, the case not being within the late act. Sect. 5 applies only to motions for a mandamus to proceed to the election of any corporate officer or officers, or "for an information in the nature of a quo warranto against any person claiming to be a corporate officer of and in any of" the boroughs mentioned in schedules (A) and (B) of stat. 5 & 6 W. 4, c. 76, or incorporated since that act. A mere burgess is not an "officer" within those provisions. If that word has the same meaning in both the parts of sect. 5 just referred to, it can scarcely apply to a burgess, who is not made such by "election." And the previous clauses in which officers are

\*590] mentioned all \*seem to contemplate elective offices. Indeed burgesses, strictly speaking, are not corporation officers, but the body from which they are elected.

*Addison*, contra. There is no case in which it can be more important to expedite a decision than the case of a burgess. One reason is, that the burgess list cannot be opened on a dispute touching only the election of a superior officer. [COLERIDGE J., the mandamus directed by stat. 7 W. 4, & 1 Vict. c. 78, s. 24, in the case of a burgess, is not to elect but to insert the name on the roll: this shows that burgesses are not contemplated in that part at least of stat. 6 & 7 Vict. c. 89, s. 5, which speaks of "mandamus to proceed to an election of any corporate officer."] That may show a restricted meaning as to mandamus, but not as to quo warranto. [COLERIDGE J. You impose this hardship in the case of a burgess, that, if any one seeks to displace him, he may be compelled to show cause in the first instance; whereas, if he seeks to be restored to the burgess roll under stat. 7 W. 4, & 1 Vict. c. 78, s. 24, he must proceed in the ordinary course of applications for mandamus.] A burgess is a "corporate officer" according to the strict sense of the words: if he were not, a quo warranto would not lie. The course proposed is the most beneficial for all parties. [COLERIDGE J. You might have moved this in Michaelmas term.]

Lord DENMAN, C. J. The burgess is liable to a quo warranto as claiming a franchise. But sect. 5 of stat. 6 & 7 Vict. c. 89, makes provision for the case of an "officer," and accompanies it with terms which show \*that officers, municipally speaking, if I may say so, are contemplated. The rule must be to show cause. [\*591]

PATTESON and COLERIDGE, Js., concurred.(a)

Rule nisi.

(a) Wightman, J., was absent.

### In the Matter of MORTEN.

An order of maintenance under stat. 59 G. 3, c. 12, s. 26, directing payments to be made so long as the poor person shall be "chargeable," is bad; the word "chargeable" not being equivalent to the words "not able to work," used in the statute.

An order for maintenance of paupers by a relation, if it direct an entire sum to be paid for the maintenance of three, so long as the three shall be chargeable, is bad as to all.

WHITEHURST moved for a certiorari to bring into this court an order of maintenance made by two justices of the county of Derby in petty sessions.

The order recited a complaint by the overseers of the poor of Chapel in le frith, Derbyshire, that Mary Morten, an infant of the age of five years, and Joseph and Sarah Jane Morten, of the ages of three years and of eight months, were poor and unable to work so as to maintain or support themselves, and were chargeable to the said parish; and that Joseph Morten, dwelling at, &c., and within the jurisdiction of the justices, was the grandfather of the said Mary, Joseph and Sarah Jane, and was of sufficient ability to relieve and maintain them: whereupon the said Joseph, the grandfather, was summoned to petty sessions to show cause why an order should not be made upon him for the maintenance of the said infants; and he appeared and did not show sufficient cause. The order then proceeded: "Now we," &c., (the justices,) "having duly considered," &c., "do adjudge and determine that the said M. M., J. M., and S. J. M., are poor and unable to work so as to maintain and support themselves, and that they are now actually chargeable \*to the said parish of Chapel in le frith, and that the said Joseph Morten is the grandfather of the said M. M., J. M., and S. J. M., and is of sufficient ability to relieve and maintain the said M. M., J. M., and S. J. M., his grandchildren: and, it being proved to us that the said Joseph Morten dwells now within our jurisdiction, we do therefore order that the said Joseph Morten shall, upon notice," &c., "pay or cause to be paid to the overseers," &c., "weekly and every week from this present time, the sum of 6s. for and towards the relief and maintenance of the said M. M., J. M., and S. J. M., for and during so long a time as the said M. M., J. M., and S. J. M. shall be chargeable to the said parish of Chapel in le frith, or until the said Joseph Morten shall be ordered to the contrary. Given, &c. [\*592]

It appeared on affidavit that the infants were children of an illegitimate son of Joseph Morten, and that this defence was made at the petty sessions.

*Whitehurst* now contended, first (citing *Rex v. Reve*, 2 Bulst. 344,) that the statutes as to maintenance apply only to legitimate relations: secondly, that the grandfather was improperly ordered to pay "during so long a time as" the infants "shall be *chargeable* to the said parish;" whereas stat. 59 G. 3, c. 12, s. 26, (following the language of stat. 43 Eliz. c. 2, s. 7,) empowers the justices in petty sessions to make orders upon the father, grandfather, &c., "for the relief of every poor, old, blind, lame, impotent or other poor person *not able to work*;" and that the word "chargeable" was not equivalent to the words "not able to work."

\*593] *Humfrey* showed cause in the first instance. The fact of illegitimacy does not appear on the order, and could not be suggested on affidavit if the certiorari went and a return were made. Then as to the form. [Lord DENMAN, C. J. Does an appeal lie?] None is given. "Chargeable" is a convertible term with poor and "not able to work." [COLERIDGE, J. There is another objection. The party is ordered to pay an entire sum of 6s. a week so long as all the infants are chargeable.] The only consequence is that, if one ceased to be so, the order would be no longer in force, and a new summons must issue.

Lord DENMAN, C. J. I think the justices ought to have ordered relief expressly for each child. Such a direction may be necessary for the guidance of the party charged. And the terms "chargeable" and "not able to work" are not convertible.

PATTESON, J. The terms are not convertible; for a person might be able to work, and yet not able to earn enough for his maintenance. The rule must be absolute.

COLERIDGE, J., concurred.(a)

Rule absolute.(b)

(a) Wightman, J., was absent.

(b) See, as to the certainty requisite in orders of maintenance, *Rex v. Cornish*, 2 B. & Ad. 498; *Regina v. Read*, 9 A. & E. 619.

594] \*HOLROYD and Another v. REED and Another.

A plea *puis darrein continuance* may be amended on terms, though an assize has elapsed since it was pleaded.

MARTIN, in last Michaelmas term, obtained a rule to show cause why the defendants in this case should not be at liberty to amend their plea *puis darrein continuance*.(a) The following among other facts appeared on affidavit for and against the rule.

The action was for goods sold, &c. Defendants, on January 12th,

(a) Other things were prayed by the rule; but no further mention of them is necessary. The nature of the proposed amendment was not stated.

1843, pleaded never indebted, and other pleas. Issue was joined, and notice of trial given for the following Spring assizes to be holden on March 4th. On March 1st a fiat in bankruptcy issued against the plaintiffs; they were declared bankrupts on March 2d; and on March 3d the defendants pleaded, *puis darrein continuance*, the bankruptcy of the plaintiffs, and that their effects were assigned to Charles Fearne, who was appointed by one of the commissioners of the Court of Bankruptcy for the Leeds district to be the official assignee. Notice of the plea was given to the plaintiffs on March 4th; and they withdrew the record, and, on June 13th, 1843, demurred, assigning for causes, among others, that Fearne was not shown to be one of the persons chosen under the Bankrupt Act by the lord chancellor to act as official assignees in all bankruptcies in the country,<sup>(a)</sup> nor did it appear that he was duly selected to act for the estate of the plaintiffs: that the commissioner was not shown to have had power to appoint Fearne; and that facts were not alleged from which it would appear that Fearne became sole assignee according to the statute, or that the estate vested in him: that the matter of defence was not alleged or shown to have arisen after the last pleading or after issuing of jury process;<sup>(b)</sup> and that the plea did not distinctly allege that the plaintiffs were traders within stat. 6 G. 4, c. 16. The defendants, on November 1st,<sup>(c)</sup> joined in demurrer to prevent judgment being signed; and they gave notice to the plaintiffs that the joinder was put in for that purpose, and that the defendants would apply to the court for liberty to enter a *stet processus*, or otherwise as they might be advised. [\*595]

*Baines* and *Pashley* now showed cause. It is doubtful, at least, whether a plea *puis darrein continuance* can be amended. Such pleas, "being productive of delay, are subject to the same sort of restraints as pleas in abatement;" 2 Tidd. 850, 9th ed.; and those are not amendable. Tidd. cites a case, in Smith's Reports, of *Lindo v. Simpson*, 2 Smith, 659, where a plea *puis darrein continuance* was amended on terms; but the case is not reported in East. The strictness with which pleas of this kind have always been regarded appears from Yearb. Trin. 9 H. 6, 22, A, B. 23, A. pl. 18; Yearb. Mich. 9 H. 7, 8, B. 9 A. pl. 5; Bro. Abr., *Continuances* and *Imparlances*, pl. 5.

\**Martin* (with whom was *Hance*,) *contra*. The present plea *puis darrein continuance* is substantially a good answer; and no ground is shown for questioning its truth. The defendants do not seek to add any thing new, but only to make the plea, in its terms, more conformable to the fact which the defendants meant to rely upon when they first pleaded it. (He was then stopped by the court.) [\*596]

LORD DENMAN, C. J. I cannot discover any reason which prevents a plea *puis darrein continuance* from being amended. The rule, as to this,

(a) See stat. 5 & 6 Vict. c. 122, s. 48.

(b) Reg. Gen. Hil. 4 W. 4. General Rules and Regulations, 2; 5 B. & Ad. il.

(c) Their affidavits gave reasons for the delay, which were discussed in the argument, but not particularly observed upon by the court.

will be absolute, but on payment of costs of the amendment and of this application.

**PATTESON, COLERIDGE, and WIGHTMAN, Js., concurred.**

**Rule absolute to amend on payment of costs as above.**

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**\*597] \*The QUEEN, on the Prosecution of the Mayor, Aldermen and Burgesses of MAIDENHEAD, v. The GREAT WESTERN RAILWAY COMPANY.**

The general rule of practice is, that a party failing in a motion by reason of a defect in his affidavit shall not repeat his application on an amended affidavit, showing no ground of application which might not have been presented before.

The only exceptions which the court will generally admit are where the amendment consists merely in correcting an error in the title or jurat of the affidavit.

Where a motion for costs of mandamus was made on affidavit, entitled "The Queen, on the prosecution," &c., "against The Directors of The Great Western Railway Company," and in the body of the affidavit it was stated that the prosecutors had moved for a mandamus against "The Directors," &c., whereas in fact the application had been made against "The Great Western Railway Company," and on this ground the rule was discharged.

*Held*, that a second motion for costs could not be made on an affidavit corrected in the title and body as to the description of the defendants, though not altered in any other material respect.

In Trinity term, 1843, a rule was made absolute for a mandamus commanding The Great Western Railway Company, to pay a sum of money to the mayor, aldermen and burgesses of Maidenhead, under sect. 230 of the act 5 & 6 W. 4, c. cvii. (local and personal, public,) by which the company is incorporated. The mandamus was obeyed without making a return: and the prosecutors, in last Michaelmas term, moved for costs of the rules for a mandamus and of the writ, and of that application. Cause was shown in the same term, November 24th; and it was objected that the affidavit on which the rule had been obtained was entitled, "The Queen, on the prosecution," &c, "against The Directors of the Great Western Railway Company," whereas the mandamus had issued, not against individual directors, but against The Great Western Railway Company, by its name of incorporation; and that the same misdescription appeared in the body of the affidavit, when the defendants were there named.<sup>(a)</sup> On this ground the \*rule was discharged. The prosecutors then moved for a rule calling upon The Great Western

**\*598]** <sup>(a)</sup> The affidavit stated that the court had granted a rule to show cause why a mandamus should not issue commanding the "Directors of" The Great Western Railway Company to pay, &c.; and that the court, on argument, was "pleased to make the said rule absolute, and to direct that a writ of mandamus should issue commanding The Great Western Railway Company to pay," &c.; that a "mandamus issued accordingly;" and that the secretary of the company agreed on their behalf to pay the sum then in question; but that the costs now claimed had not been paid by the company or by any other person.

Railway Company to show cause why they should not pay the above mentioned costs. The affidavit in support of the rule did not vary from the previous affidavit in any material respect except that the words "The Directors of" were omitted were they had been objected to before; and a paragraph was added, stating the discharge of the former rule nisi for costs, and the ground of it, and alleging that the merits of the case had not been gone into, nor the sufficiency of the affidavit discussed in any other respect than that above mentioned. A rule nisi was granted.

Sir *W. W. Follett*, solicitor-general (with whom was *R. V. Richards*,) now showed cause. The former rule having been discharged for a defect in the affidavit, the parties cannot bring the same matter forward again on amended affidavits. Lord DENMAN, C. J., lays this down very strongly in *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. 413, 427, (a) saying: "A party after once failing in consequence of a defect in the way in which he brought his case forward, is not entitled to renew the same application." [COLERIDGE, J. I thought that, where an application had been dismissed merely \*for a defect in the title of an affidavit, the affidavit might be resworn and the motion made again.] [\*599]

In *Rex v. The Justices of Warwickshire*, 5 Dowl. P. C. 382, the court permitted an affidavit to be amended in the title for the purpose of a renewed application; but here the defect was not in the title only. It is no answer to this objection that the merits of the case were not discussed on the previous motion; that was so in *Regina v. Pickles*, 3 Q. B. 599, note (a); yet the court, having discharged a former rule for a defect in the affidavits, refused, on a second application, to hear the case argued. [WIGHTMAN, J. In *Shaw v. Perkin*, 1 Dowl. N. S. 306, the court allowed a second application on amended affidavits, the merits not having been discussed before; but there the defect was only in the jurat. COLERIDGE, J. The distinction seems to be that, where the amendment does not touch the body of the affidavit, a second application may be allowed; otherwise not.] It may be said that the amendment here is not material; but, if any alteration in the body of the affidavit be permitted, no limit can be drawn. (He was then stopped by the court.)

Sir *F. Pollock*, attorney-general, and *Hugh Hill*, contra. The objection here was simply that there was no such cause as that in which the affidavit purported to be made. The title was altered to remove that fault; and a corresponding alteration was made in the body of the affidavit. If the one correction was allowable, the spirit of the rule referred to cannot exclude the other. The case is not like that of a party renewing his application upon fresh materials. [PATTESON, J. Suppose an affidavit \*were properly entitled, but the deponent's addition not rightly given: could the party moving make another application?] [\*600] There the second application would appear to be in the same cause as the first; here that is not so. [COLERIDGE, J. According to that argument.

(a) See *Regina v. The Deptford Pier Company*, 8 A. & E. 910, 917.

you might now have put in entirely new affidavits. PATTESON, J. If the title of this affidavit had been right, but the body wrong, we should not have allowed you to move again. You wish, because the title was wrong, to draw in an amendment of the rest.] The mistake in the title was important; that in the body was not. The court will look at the substance of what is sworn, and see if the correction is material. No new allegation is introduced, but only a description altered. The material part of the affidavit is, that the court granted a mandamus, and thereupon certain proceedings took place; and that part is not affected by the alteration. PATTESON, J, held, in *Sherry v. Oke*, 3 Dowl. P. C. 349, that the discharge of a prior rule is conclusive against a second application “where the materials are originally defective in substance, but not where there is a mere slip of form.” [PATTESON, J. I am not sure that I was right in that case: but I was very much influenced by the circumstance that the parties supporting the award had consented to the rule being enlarged, and then raised a technical objection to the rule which might have been cured if taken at the regular time, before the rule was enlarged.(a)]

LORD DENMAN, C. J. The ruling in *Sherry v. Oke*, 3 Dowl. P. C. 349, may perhaps be questioned. In that case, however, there were particular circumstances, such as might induce the court to exercise a power which we do not mean wholly to repudiate. But the general rule is \*601] that which was laid down in *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. 413, 427: the exception is where the alteration would be simply in the form of a title or jurat, and reswearing the affidavit would clearly leave parties in the same situation in which they were before. The prosecutors here do not come within the exception. To make their application admissible we have to look at the particulars of the affidavit and its history, and an ingenious discussion is required. The general rule is simple, and easily applied. If we allow of alterations beyond its limit, we impose difficulties on ourselves, and tempt suitors into multiplied litigation.

PATTESON, J. I am of the same opinion, and think that motions on amended affidavits should be allowed only where the alteration is in the title or jurat. I believe I was wrong on this point in *Sherry v. Oke*, 3 Dowl. P. C. 349, though no injustice was ultimately done by the decision.

COLERIDGE, J. To relax the rule in the manner contended for would lead to infinite variations. As to the suggestion that a different cause is before us, the very cases in which an alteration of title has been deemed an exception to the rule show that the cause, in such cases, has been considered still the same.

WIGHTMAN, J., concurred.

LORD DENMAN, C. J. It is clear in this case that the application and parties are the same on both rules. Rule discharged.

(a) See 3 Dowl. P. C. 360.

## \*SMITH v. C. D. DICKINSON and J. DICKINSON. [\*602

Where a judge at Nisi Prius, under stat. 1 W. 4, c. 7, s. 2, certifies for speedy execution "for the sum found by the verdict," the plaintiff cannot have a ca. sa. for such sum, and, after execution thereof, another ca. sa. for the taxed costs.

So held where the certificate was given, March 13th, and the master had declined to endorse his allocatur for costs, and deliver it so endorsed, before the fifth day of Easter term.

THIS was an action of assumpsit for goods sold and delivered, tried before PARKE, B., at the Yorkshire Spring assizes, 1843; when a verdict was found for the plaintiff, for 32*l.* 8*s.* 4*d.* damages, and 40*s.* costs. The learned baron, on the verdict being given, made the following endorsement on the record. "I certify that I am of opinion execution ought to issue on 13th March, 1843, for the sum found by the verdict.

J. PARKE."

The plaintiff's attorney served the attorney for the defendants with notice of taxing costs for 13th March, and attended accordingly; but no one attended for the defendants. The costs were taxed at 69*l.* 12*s.* 8*d.*: and the master informed the plaintiff's attorney that, if he intended to issue execution immediately, the postea would not be marked for the costs till the Easter term following, and that the master, if he now marked the postea for costs, would retain the postea in his own hands till term, but that plaintiff might issue immediate execution for the 32*l.* 8*s.* 4*d.*, and, on the fifth day of the Easter term, have another execution for the taxed costs. The plaintiff's attorney took out a ca. sa. against the two defendants, "to satisfy James Scott Smith 32*l.* 8*s.* 4*d.*, which the said James Scott Smith lately, in our court before us at Westminster, recovered against them for his damages which he had sustained on occasion of the not performing certain promises and undertakings then lately made by the said Christopher Dixon Dickinson and John Dickinson to the said J. S. Smith, "whereof," &c.; with interest on the 32*l.* 8*s.* 5*d.* from 13th March, 1843, "on which day the judgment aforesaid was entered up, &c. The costs were not mentioned. The teste of the writ was 8th April, 1843: and it was endorsed, "levy the whole." C. D. Dickinson was taken under this writ on 11th April, 1843, paid the 32*l.* 8*s.* 4*d.*, and was released. On 24th April, 1843, the master marked his allocatur on the postea for 69*l.* 12*s.* 8*d.*, the amount of taxed costs. The plaintiff's attorney then entered judgment for 102*l.* 1*s.* with the clerk of the judgments (as of 13th March, 1843,) and issued another ca. sa. for 69*l.* 12*s.* 8*d.*, upon which C. D. Dickinson was again taken. In last Trinity term, a rule was obtained for discharging C. D. Dickinson out of custody; which was made absolute in the same term, after argument, in the Bail Court, before WIGHTMAN, J.(a)

Afterwards, in the same Trinity term, Erle obtained a rule to show cause

(a) *Smith v. Dickenson*, 1 Dowl. & L. 155.

why the plaintiff should not be at liberty to issue execution for the sum remaining due on the judgment.

*Joseph Addison* now showed cause. The first *capias* must be taken to have issued on the whole judgment, and therefore satisfies it fully. There cannot be two arrests on the same judgment; *Foster v. Jackson*, Hob. 52, 59, (5th ed.) By stat. 1 W. 4, c. 7, s. 2, when a judge certifies for speedy execution on a day named, "a rule,<sup>(a)</sup> for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be

\*604] issued forthwith, or \*afterwards, according to the terms of such certificate." The execution, therefore, ought to have issued in the first instance for both damages and costs. The judge's certificate merely designates the day on which execution may issue, "subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict." The plaintiff has acted as if the effect of the certificate were to separate the judgment into two parts, each authorizing a distinct execution.

*Erle*, *contra*. The certificate was only "for the sum found by the verdict." [COLERIDGE, J. The statute authorizes the taxation of costs and judgment, as incidental to the certificate for the whole or part of the sum found by the verdict. PATTESON, J. Where the verdict is for the plaintiff, I never mention costs in the certificate. In the case of a nonsuit, the certificate would indeed relate to costs only. COLERIDGE, J. In effect you are calling upon us to review my brother WIGHTMAN's decision in the Bail Court.] It appears that the learned judge was misinformed as to the first *capias*, which was not, as stated in his judgment, to satisfy the damages and costs, but only the damages for not performing the promises. The costs therefore are still unsatisfied by the first *ca. sa*.

LORD DENMAN, C. J. The case is fairly stated by Mr. *Erle*; but I do not accede to his view. He contends that the judge's certificate excludes the costs. In my opinion that is not so: the judgment to be entered on the certificate includes the costs. The plaintiff has been misled.

\*605] \*PATTESON, J. I do not say that the judge might not prevent execution for costs issuing immediately, since he may make his certificate subject to any condition or qualification. But upon this certificate I have not the slightest doubt.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule discharged.

(a) See now R. Tr. 4 Vict., 1 Q. B. 699.

END OF HILARY TERM.

## \*HILARY VACATION.(a)

[\*606]

## WHARTON v. MACKENZIE.

## CRIPPS v. HILLS.

In an action for goods sold and delivered, infancy was pleaded: replication, that the goods were necessaries suitable to the estate and condition of defendant. It appeared at nisi prius that defendant was residing as an undergraduate at Oxford; and that the goods consisted of articles supplied for dinners at his own rooms (where he received parties of friends,) and for fruit, confectionary, &c. *Held,*

1. That, in default of explanation, the court would treat them as not necessaries.
2. That, in case of explanation respecting any of the articles (as in the case of illness, where fruit, &c., was medically prescribed,) the question whether the articles were necessaries or not would be a mixed one of law and fact.
3. That the rank or fortune of the defendant might make some articles "necessaries," which, in the case of another person, must be deemed articles of mere comfort and convenience; but that articles which, in the particular case, are matters of comfort and convenience merely, can never be included under the term "necessaries."
4. That articles which might in some situations be necessaries might not be so to a defendant in statu pupillari at Oxford, where necessaries are, to a certain extent, supplied by the college.

WHARTON v. MACKENZIE was an action of debt for goods sold and delivered; and on an account stated. The particulars consisted of an account of 33*l.* 7*s.* 11½*d.* for fruit, confectionary, marmalade, ices, soda-water, tongues, sausages, &c., from October 23d, 1835, to March 18th, 1837, inclusively. Plea: infancy of defendant. Replication, so far as relates to the goods: that they "were, at the time when they were sold and delivered," "necessaries suitable to the then degree, estate, circumstances and condition of the said defendant:" verification. As to the account stated, nolle prosequi. Rejoinder: "that the said goods were not, nor were any of them, or any part thereof, necessaries suitable to the then degree, estate or condition of him the defendant, in manner and form," &c. Issue thereon.

On the trial, before WIGHTMAN, J., at the Oxfordshire \*Spring as-  
sises, 1843, the delivery of the article was admitted. It appeared that the defendant, during the whole time mentioned in the particulars, was an undergraduate of Oxford, resident in college, and associating with men of rank and fortune in the university; and that some of the articles were furnished, for entertainments which he gave to his acquaintance, by the plaintiff, who was a tradesman in the city of Oxford. It was further shown that, during part of the time, the defendant was under medical treatment (for the measles and inflammation of the lungs,) and was ordered to take fruit, marmalade, ices and soda-water. His father was governor of Ceylon. The learned judge told the jury that, in considering what articles should be considered necessaries, they were to take into their estimation the rank and fortune of the defendant, and to determine

(a) The court sat in banc on the 2d, 3d, 5th, 8th, 9th, and 10th of February.

whether the supply, either for himself or the company which he kept, was extravagant, or such as might be fairly supplied to a young man living in good society. Verdict for plaintiff.

In Easter term, 1843, *Talfourd*, Serjt., obtained a rule nisi for a new trial on the ground of misdirection.

*F. V. Lee* and *Pigott* now showed cause: and *Talfourd*, Serjt., appeared in support of the rule; but the court desired, before deciding this case, to hear the argument in *Cripps v. Hills*.

*Cripps v. Hills* was an action of debt for goods sold and delivered, and on an account stated. Pleas. 1. As to all but 25*l.* nunquam indebitatus. Issue thereon. 2. As to all but the said sum of 25*l.* infancy of defendant.

\*608] Replication. As to 24*l.* 13*s.* 8*d.* parcel of \*the sum in the first count mentioned (excepting the 25*l.*) that the goods were, "at the time of the sale and delivery thereof, necessaries suitable to the then degree, estate and condition of the defendant:" as to the residue of the plea, that, at the time of the accruing, &c., defendant was of full age. Rejoinder: as, to the 24*l.* 13*s.* 8*d.* that the goods "were not, nor were any of them, at the time of the sale or delivery thereof, necessaries suitable to the then degree, estate and condition of the defendant, in manner and form," &c.: as to the replication to the residue, issue joined. The plaintiff joined issue as to the 24*l.* 13*s.* 8*d.* 3. Payment of 25*l.* into court; which the plaintiff took out.

On the trial, before MAULE, J., at the Oxfordshire Summer assizes, 1843, it appeared that the plaintiff was a tradesman in the city of Oxford, and that the claim was for articles supplied to the defendant during about two years and a half, while the latter was a resident and undergraduate in the University of Oxford. The articles consisted of wild ducks, grouse, fowls, deserts, &c. It further appeared that his father was a gentleman possessing landed property to the clear amount of nearly 2000*l.* a year, and allowed the defendant 300*l.* a year: and that, on one occasion, he had visited Oxford, and partaken, at the defendant's rooms, of some of the articles supplied. That the defendant associated with men of rank and fortune at the university, and had given entertainments at his rooms, where several of the articles were supplied. He was supplied with commons from the hall of which he was a member. The learned judge told the jury that the question on the record was whether the articles supplied were such things

\*609] as the defendant could not do without: and that, \*as the action was not against the defendant's father, the knowledge of the latter had nothing to do with the question which the jury had to try. Verdict for the plaintiff, for 24*l.* 13*s.*

In Michaelmas term, 1843, *Talfourd*, Serjt., obtained a rule nisi for a new trial, on the ground of the verdict being contrary to the evidence.

*Whateley* and *F. V. Lee*, now showed cause: and *Talfourd*, Serjt., was partly heard in support of the rule in this case, and of the rule in *Wharton v. Mackenzie*, but was then stopped by the court.

Arguments against the rules. It would be going too far to hold that an undergraduate is never to entertain friends at his rooms: and a tradesman may suppose it to be notorious that this, as a matter of course, must take place, though it ought not to be allowed to an extravagant extent. But as to the extent the jury were to decide. In *Hands v. Slaney*, 8 T. R. 578, where the question was whether a captain in the army, being an infant, was liable for a livery furnished to his servant, Lord KENYON, laid down the principle thus. "I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery. The general rule is clear, that infants are liable for necessities, according to their degree and station in life. This defendant was placed in a situation which required such an attendant. Therefore, however, inclined I am in general to protect infants against improvident contracts, \* I think that this case falls within the fair liability which the law imposes on infants, of being bound for necessities, which is a relative term, according to their station in life." [\*610 *Brooker v. Scott*, 11 M. & W. 67, may be cited on the other side. There the Court of Exchequer made a rule absolute for a nonsuit, on the ground that the articles supplied were *prima facie* and without explanation, not necessities. The court, however, appeared to adopt the doctrine of PARKE, B., in *Peters v. Fleming*, 6 M. & W. 42, which was substantially the same with that cited from Lord KENYON, and where the court held that the question ought not to be withdrawn from the consideration of the jury. In order so to withdraw it, the court must be satisfied that not a single article can fall within the description of necessities; *Maddox v. Miller*, 1 M. & S. 738, and that principle was recognised in *Brayshaw v. Eaton*, 5 New Ca. 231. In *Ruinford v. Fenwick*, Carter, 215, where the defendant by his demurrer confessed that the articles were necessities, the court said, "the defendant should have come and rejoined they were not for necessities, and so upon the issue; the jury should have tried it." This is perhaps not easily reconcilable with *Brooker v. Scott*, 11 M. & W. 67. In the case of *Cripps v. Hills*, the father was present, a fact which goes far to justify the verdict; *Dalton v. Gib*, 5 New Ca. 198.

Arguments against the rules. In *Harrison v. Fane*, 1 M. & G. 550, the court took upon itself to set aside, as perverse, a verdict where the jury had found that horses, saddles and harness were necessary to a student at Oxford. \**Brooker v. Scott*, 11 M. & W. 67, shows that there should have been a nonsuit in *Cripps v. Hills*. [\*611

LORD DENMAN, C. J. The frequent occurrence of these cases makes it very important for us to consider carefully what the rule is. It cannot be more accurately laid down than has been done by my brother PARKE in *Peters v. Fleming*, 6 M. & W. 46. He says, "It is perfectly clear, that from the earliest time down to the present, the word *necessaries* was not confined, in its strict sense, to such articles as were necessary to the sup-

port of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out." In these cases issue is joined on the averments, in the replications, that the articles supplied were necessaries suitable to the estate and condition of the defendants. In one of the cases the defendant had an allowance from his father. It seems to me that in *Wharton v. Mackenzie* the judge would have been justified in telling the jury that whatever was furnished for the entertainments given by the defendant to his acquaintance was not proved by the plaintiff to be necessary, and was indeed proved not to be so: and so far the question was properly one of law. I do not think that the Court of Exchequer meant, in *Brooker v. Scott*, 11 M. & W. 67, to go farther than this, or to withdraw from the jury the general question whether the goods furnished were

\*612] necessaries. For a young man in some situations of life, not \*only clothes may be considered necessaries, but a watch, and the like articles, which he is expected to wear in that condition of life: but, with respect to the articles here supplied, it is an outrage to common sense to say that they can possibly be necessaries. It may perhaps seem harsh and illiberal to refuse payment for these things. But it is the duty of tradesmen to make themselves acquainted with the circumstances of the parties they are supplying: and, above all, it cannot be necessary to give long credit. A tradesman who chooses to supply such things may require ready money, or send in his bill speedily: otherwise the results may be most embarrassing and degrading. The law is bound to protect parties from such consequences. That remark indeed applies most strongly to the circumstances of the case of *Cripps v. Hills*. We can, however, only look to the rule of law; that has been most clearly laid down; and it is important that it should be strictly adhered to.

COLERIDGE, J.(a) I am of the same opinion. It is a most important inquiry, how far the question is for the court and how far for the jury. In some cases the question must be for the judge. Suppose the son of the richest man in the kingdom to have been supplied with diamonds and racehorses, the judge ought to tell the jury that such articles cannot possibly be necessaries. In *Wharton v. Mackenzie* the fact of the defendant's illness was proved in order to explain the supply of some of the articles. In such a case, the question is a mixed one of law and fact, and must go,

\*613] with proper \*directions, to the jury. Without any explanation, the court will decide the question. As to what is the meaning of the word "necessaries," we have my brother PARKE's admirable judgment; to which I will make only one addition, suggested by the argument urged at the bar. It is said that we are to look at the circumstances of each defendant. True: we must do so. But the articles supplied must be necessaries, and not merely comforts or conveniences. Then we

(a) Patteson, J., was absent.

shall arrive at the principle acted on in *Brooker v. Scott*, 11 M. & W. 67, where the court decided that it could not be necessary for an undergraduate to have dinners at his own lodgings, unless under circumstances furnishing an explanation. It cannot otherwise be necessary, though possibly convenient or proper. This rule imposes no hardship on tradesmen. If they do not intend to pander to extravagance, let them not give credit. In one of these cases, the bill was allowed to run on for two years and a half. That could have been done, only, lest, if the bill were sent in earlier, the supply of such articles might be stopped. Tradesmen must understand that, if they choose so to act, they are trusting only to what they call the honour of the parties supplied.

WIGHTMAN, J. I am of the same opinion. In the case tried before me, *Wharton v. Mackenzie*, the defendant was the son of a gentleman of rank and station: it was urged that the case ought to be considered with reference to his position in society; and it was shown that he associated with persons of rank equal to his own. I think I did not sufficiently explain the terms used in the \*replication; I should have pointed out that they ought to be construed here with reference to a person in *statu pupillari* at college, supplied from the college with what is generally necessary. For, if the defendant's position in society calls upon him to entertain his friends, that can be only when he has money to defray the expense of so doing. The articles of which this bill is composed cannot be necessaries if they cannot be supplied without giving credit. [\*614]

In *Wharton v. Mackenzie*, rule absolute, without payment of costs.

In *Cripps v. Hills*, rule absolute, on payment of costs.

### The QUEEN on the Prosecution of HARRIS v. SMITH, Clerk.(a)

Mandamus to a vicar to restore T. H. to the office of parish clerk. Return, that T. H. had on several specified occasions misconducted himself by designedly irreverent and ridiculous behaviour in his performance of his duty; by appearing in church drunk, so as to be incapable of performing it; and by indecently disturbing the congregation during the administration of the sacrament. The return stated that the alleged acts were done in the view and presence of the defendant, and after repeated reproof, whereupon the defendant removed him from his office of clerk. Plea, stating that T. H. had not been summoned to answer for his conduct before his removal.

Held, that the return was bad for not showing such summons.

MANDAMUS to restore Thomas Harris to the office of parish clerk and sexton.

The writ recited that defendant was vicar of the parish of St. Faith, Overbury, in Worcestershire; that Harris had been duly admitted to the office of clerk and sexton of the parish; and that defendant had

improperly and without reasonable cause removed him from the said office.

\*615] The return to the writ stated that the defendant had \*been duly presented to and inducted into the vicarage of St. Faith, Overbury, in the county of Worcester; that, from time whereof, &c., there had been and of right ought to be a clerk of the said parish, which clerk for the time being, from time whereof, &c., of right held the office of sexton of the said parish; that, during all the time aforesaid, it of right belonged and appertained to such vicar for lawful cause in that behalf from time to time to remove from the said office of clerk and sexton the person who for the time being might fill the same, and from time to time to appoint and admit to the said office, upon any vacancy legally arising therein, a discreet and proper person in that behalf. And that, at the time when defendant became vicar, and thence until, &c., the prosecutor Harris was the acting clerk of the parish, but not duly registered as such; and, by reason of his being such clerk, held and filled the office of sexton, and so was acting clerk and sexton of the said parish; and that it was the duty of the said Harris, as such clerk, &c., to say and pronounce in a decent, becoming and reverent manner the matters and responses which, according to the Rubric, are appointed to be said in churches by the people during the celebration of divine service in the church, according to the Book of Common Prayer. That, on divers days whilst defendant was such vicar and Harris such clerk and sexton, viz. on 30th November, 1841, that day being St. Andrew's day, and on Christmas day, 1841, and on divers other days, each of them being the Lord's day, to wit 14th August, 1842, 21st August, 1842, 25th September, 1842, and 2d October, 1842, and upon every Lord's day which fell between 2d October, 1842, and the day when the said T. Harris was removed, and on Ash Wednesday, to wit 9th February, 1842, the \*divine service contained in

\*616] the Book of Common Prayer of the Church of England, as and for and being the service of the Church of England appointed to be celebrated in churches on those days respectively, was celebrated in the parish church according to the Rubric in that behalf, and according to the custom and order of the Church of England. That, on divers of the said days, to wit on, &c., the said T. Harris, in the course of the celebration of the said services, on the said days, in the presence and hearing of the defendant, did designedly and of purpose say and pronounce the matters and responses, which it was his duty to say and pronounce in the course of the said services, in an indecent, unbecoming and irreverent tone and manner, thereby wickedly and irreverently intending to move, and whereby he then did move, divers persons then present in the said church, and of the congregation thereof, during the celebration of the said services, to irreverent laughter in the said church during the said services, and whereby divers other persons then of the said congregation were greatly distressed and annoyed, and the defendant himself made ill and obstructed in the

performance of his duties. Whereupon afterwards, to wit on each of the said last mentioned days and times, the defendant reproved the said T. Harris, and on each of those days requested him not to repeat his aforesaid conduct in the course of the celebration of divine service in future. That the said Thomas Harris did nevertheless, on certain other of the said days on which the said services were celebrated, to wit on, &c., being after the said T. Harris had been so guilty of the said conduct, and after he had been so reprov'd, in the presence and hearing of defendant, with a wicked mind and designedly and of purpose, again say and pronounce the matters \*and responses which it was his duty to say and pronounce in the course of the celebration of the said services on each of the last [\*617 mentioned days, in an indecent, unbecoming and irreverent tone and manner, thereby wickedly and irreverently intending to move, and whereby he then did again move, divers persons then present in the said church, and of the congregation thereof, &c., (as before.) That, on certain other of the said days on which the said services were celebrated in the said church, to wit on, &c., and on Christmas day, 1841, the said Thomas Harris was, during the celebration of the said services, in the sight, presence and hearing of the defendant, drunk and intoxicated, and affected by and with intoxicating drinks and liquors, and on each of the last mentioned days was, by reason thereof, and in the presence and hearing of the defendant, unable to say and pronounce the matters and responses, so to be said by him as such clerk, in a decent, becoming or reverent manner, and did not say or pronounce the same or any of them in a decent or becoming manner, but, on each of the said last mentioned days, and in the presence and hearing of defendant, said and pronounced the same in an unbecoming, indecent, ludicrous and ridiculous manner, and thereby made it known and apparent to all the congregation then in the said church, and present at the said services, that he was drunk and intoxicated: and thereby on each of those days the said Thomas Harris moved divers of the said congregation to irreverent laughter in the church. (The return then stated another instance of a repetition of the offence after reproof.) That on another day, to wit on, &c., defendant prepared to administer in the said parish church the sacrament to divers members of the church; and that on \*that day the said T. Harris, well knowing that de- [\*618 fendant was then about to administer the said sacrament, presented himself at, and made a noise and disturbance at, the communion table of the said church at which defendant was about to administer the said sacrament; whereupon defendant then asked him if he intended to partake of the said sacrament; whereupon the said T. Harris then, in the church and in the presence and hearing of defendant, said he did not intend to partake of the said sacrament; and thereupon defendant then requested him to leave the said communion table, and to cease from making such noise and disturbance, and to depart to a convenient distance from the said communion table, so that he might not obstruct the due and pro-

per administration of the said sacrament to such as were willing to be partakers thereof; but the said T. Harris then refused to depart from the said table, and there continued to make such noise and disturbance as aforesaid for the space, to wit, of half an hour, and then remained so near to the said table and in such a position in relation thereto and to the persons then willing to partake of the said sacrament, for the space, to wit, of half an hour, whereby the said T. Harris then did intend to obstruct, and whereby the said T. Harris then and in the presence and hearing of defendant, in the said church and at the said communion table, did obstruct, the due and proper administration by defendant of the said sacrament. And thereupon, after the said several premises and for and because of the misconduct of the said Thomas Harris as such clerk and sexton as aforesaid as above set forth, and before the issuing of the writ, to wit on, &c., defendant did, in due form of law, remove the said T. Harris from

\*619] the office of clerk and sexton, as it was \*lawful for him to do for the cause aforesaid. And, after the said removal of the said T. Harris and before the issuing of the said writ, to wit on, &c., the said office then being lawfully vacant by the said removal of Harris, defendant nominated, appointed and admitted one William Darke, being a discreet and proper person, to be the clerk and sexton of the said parish in lieu and instead of the said T. Harris; which said W. Darke thereupon then became and was, and thence continually hitherto has been, and still is, the lawful clerk and sexton of the said parish.

To this return the prosecutor pleaded: 1. Admitting the facts in the introductory part of the return, that defendant did of his own wrong, and and without the causes in the residue of the return, &c. Issue thereon. 2. That prosecutor was not before his removal summoned by defendant, or any other person on his behalf, to answer or explain the charges and causes of dismissal in the return alleged, or any or either of them, or his conduct in respect of the same. Verification. Demurrer to the second plea; joinder.

The demurrer was argued (last term,<sup>a</sup>) by *Kelly* for the defendant, and *J. W. Smith* for the prosecutor. Besides the cases cited in the judgment, the following were referred to: *Bagg's Case*, 11 Rep. 93 b; *Rex v. Davies*, 9 Dowl. & Ry. 234; *Painter v. The Liverpool Gas Company*, 3 A. & E. 433; *Burton v. Henson*, 10 M. & W. 105, and *Regina v. Langley*, in Easter term, 1842, not reported.<sup>(b)</sup> It was admitted, on the

\*620] \*argument, that the dismissal without summons would have been irregular, if the misconduct had not occurred in the presence of the

(a) January 24th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

(b) May 5th, 1842. In that case a mandamus was moved for to restore a parish clerk, dismissed, as was said, without having been summoned to answer charges against him, though it appeared that he had been seen to read the requisition for a meeting at which his conduct was to be taken into consideration. The court, on the several allegations as to notice and other facts of the case, made the rule absolute, in order that the questions might be tried on a return.

vicar. A further report of the arguments is unnecessary, the substance of them being stated in the judgment. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

To a mandamus to restore prosecutor to the office of parish clerk, defendant, the vicar, returned, &c., (his lordship here stated the acts of misconduct alleged in the return :) all which acts the defendant alleges to have been committed in his own view, whereupon defendant did, "in due form of law, remove," him from his said office. To this return the prosecutor pleaded. 1. That the defendant of his own wrong, and without the cause alleged, removed him. 2. That defendant did not, before removing prosecutor, summon him to answer and explain the charges made against him. There was a demurrer to the second plea: but the argument turned at length on the validity of the return; the question being, whether the vicar could lawfully remove the clerk, under the circumstances of the case, without affording him an opportunity of making his defence. For the vicar it was contended that, as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous; that the law invests the minister with "the functions of accuser, witness and judge, obliging him to a constant supervision and control over his inferior officer, and to the exercise of his power of removing him for indecent conduct publicly exhibited in the minister's presence. The necessity of acting on his own impression in such a case was exemplified by punishment summarily inflicted by courts of justice for contempts there committed, and by convictions on the view by magistrates under the Highway acts. [\*621

We believe, however, that the practice in the former of these supposed cases is for the court to call on a party charged with contempt for his defence, and give the opportunity of denying or explaining it before any punishment is awarded. There may be an exception in the case of actual drunkenness, which misconduct disables the party, not only from governing himself with propriety, but also from entering on any vindication. To call on a drunken man to address the court would be useless and injurious to himself, while it prolonged and aggravated the insult which his condition had already offered to it: and no adequate security exists against a repetition of the insult, but imprisonment. We apprehend, also, that a magistrate empowered to convict upon the view ought first to call on the offender. However rapid the proceeding, there must be time for stating the charge and receiving an answer. The driver seen riding in his wagon is *prima facie* a fit object for punishment: but if he showed that he had been compelled to do so by a sudden fit of illness, or by some accident which prevented him from walking, he would avoid the penalty.

If it were otherwise in these cases, still we should think that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in "which the accused should have the opportunity of bearing a part. In the argument extreme cases were supposed, [\*622

which might require an instantaneous proceeding. But even in those cases the only thing made necessary is the immediate removal of the person from the church where he creates the disturbance ; and, in the very worst that can be imagined, it is not difficult to conceive circumstances that would prove the absence of evil intention and even of gross negligence. If required to explain his behaviour, the culprit might have convinced the vicar that what appeared highly incorrect ought not to incur severe censure, much less expulsion from his office.

That important general principle which was so strenuously asserted by Lord KENYON in *Rex v. Gaskin*, 8 T. R. 209, (here his lordship read the words of the judgment in that case,) has been often held sound, and never questioned. It was acted on in *Doe dem. Earl Thanet v. Gartham*, 1 Bing. 357, in *Rex v. Neale*, in Easter term, 1835,(a) in *Rex v. Vicar of St. James, Colchester*,(b) (7th November in the same year,) in the late case of *Rex v. Governors of Darlington School*,(c) and  
 \*623] in many others not reported. We do not think its application is excluded because the charge rests on the minister's personal observation ; inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions ; while we think it indispensable, for the sake of the party charged, in all cases, to the due execution of every judicial power.

Another ground was suggested for refusing a peremptory mandamus in the present case,—that the prosecutor upon his own showing ought to be removed from his office. The language of Lord KENYON in *Rex v. Gaskin*, 8 T R. 209, admits this principle, and reconciles that decision to it there by some former cases. To the same effect later authorities may also be found, especially in *Rex v. Griffiths*, 5 B. & Ald. 731. But here the prosecutor, by pleading that he was not summoned, admits himself to

(a) See 4 N. & M. 868. May 11th, 1835. In this case, Sir W. W. Follett and W. H. Watson showed cause against, and Maule supported a rule for a mandamus commanding an incumbent to restore a parish clerk whom he had removed for alleged intoxication. The clerk had been summoned to attend the investigation of the case before the incumbent, but had refused ; upon which the incumbent examined witnesses, and then removed him. It was contended that the affidavits did not show misconduct warranting the removal. Lord Denman, C. J., Littledale, and Patteson, Js., were of opinion that the affidavits did not ; Coleridge, J., that they did show misconduct with sufficient preciseness ; and the court ordered the mandamus to issue, in order that a return might be made.

(b) In this case Sir W. W. Follett showed cause against, and Thesiger supported, a rule for a mandamus calling on a rector to restore a parish clerk whom he had removed. The affidavits in opposition to the rule alleged misconduct in the receipt of money. The court (Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.,) said that it was not shown that the clerk had had proper notice of the charge ; that an alleged admission, which was relied upon, was not such as to show misconduct : and that, at all events, a mandamus ought to issue, in order that the facts might be inquired into.

(c) See post, Michaelmas Vacation, 1844, the judgment of the court of Exchequer Chamber, affirming the judgment of this court in Hilary Vacation, 1843.

be guilty of the conduct imputed for the purpose of that plea only: and, as he takes issue upon it in the other plea, we cannot say that the whole record proves \*such admission. We must, therefore, form our opinion on the return; which, for the reason given, we think [\*624 cannot be supported. Judgment for the crown.(a)

(a) Error was brought on the judgment: but the case was compromised.

### EVANS v. HARLOW.

Declaration in case for a libel stated that plaintiff, before and at the time of the committing, &c., carried on the business of an engineer, and was the inventor and registered proprietor (under stat. 2 & 3 Vict. c. 17) of an original design for making impressions on articles manufactured in metal, and sold divers articles on which the design was used. That plaintiff, before and at the time, &c., had sold, and had on sale in the way of his said trade, articles and goods called "Self-acting tallow syphons or lubricators." And that defendant published a libel of and concerning plaintiff, and of and concerning him in his said trade, and of and concerning the said design, and plaintiff as the inventor, &c., thereof and manufacturer of the articles with the said design thereon, and of and concerning the said goods which he had so sold and had on sale, and plaintiff as the seller, as follows, viz.

"This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he calls self-acting tallow syphons or lubricators" (meaning the said design, and meaning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid,) "stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow," (meaning the defendant,) "brass-founder, Stockport, takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator," &c. "Those who have already adopted the lubricators," (meaning, &c.: same innuendo as before,) "against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed."

There was no direct averment connecting the tallow syphon with the registered design mentioned in the first part of the inducement. No special damage was alleged.

*Held*, that the words were not a libel on the plaintiff either generally, or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage.

CASE, for a libel. The declaration stated that, whereas, before and at the time of the committing, &c., plaintiff was, and still is, an engineer and millwright, and the trade and business of an engineer and millwright exercised and carried on with credit and reputation, and thereby acquired divers great gains, and also was and still is the sole inventor, author and proprietor of a new and original design for modelling or casting, or making impressions on, articles of manufacture of metals or mixed metals, which said design had \*never been published before the registration thereof as hereinafter mentioned; and the plaintiff, so being [\*625 such inventor, author and proprietor, before the publication of the said design, and before the committing of the said grievances, and after the 1st day of July, A. D. 1839, to wit on, &c., duly registered the said design, and himself, the plaintiff, as the proprietor of the same, with Frederick Beckford Long, then being the registrar of designs for articles of manu-

facture, according to the form of the statute in such case made, (2 & 3 Vict. c. 17,) and the said design was then duly numbered in the register according to the said statute (to wit) numbered 1402: and the plaintiff, after and from the time of such registration until the committing of the said grievances, and from thence hitherto, published the said design, and published, manufactured and sold divers articles of manufacture on which the said design was used, and thereby obtained and acquired great credit, reputation and profit; and every article of manufacture, so published by him the plaintiff, had thereon the name of the plaintiff, being the first registered proprietor as aforesaid, and the number of the design in the register as aforesaid, and the date of the registration thereof: and whereas, before and at the time of the committing, &c., the plaintiff had sold, and had on sale, in the way of his said trade and business, divers large quantities of articles and goods called *self-acting tallow syphons or lubricators*, and thereby honestly acquired divers great gains: yet defendant, well knowing the premises, but contriving to injure plaintiff, afterwards and within three years from the registration of the said design, to wit on, &c., falsely  
 \*626] and maliciously composed and published, and caused to be published, in a certain public newspaper, of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, and of and concerning the said design and the plaintiff as the inventor and proprietor thereof and manufacturer of the articles with the said design thereon, and of and concerning the said articles and goods which the plaintiff had so sold and had on sale as aforesaid, and the plaintiff as the seller thereof, a false, scandalous, malicious and defamatory libel, containing amongst other things the false, &c., and libellous matter following, of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, and of and concerning the said design and the plaintiff as the inventor and proprietor thereof and manufacturer of the articles with the said design thereon, and of and concerning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid, and the plaintiff as the seller thereof (that is to say:)

“This is to caution parties employing steam power from a person” (meaning the plaintiff) “offering what he” (meaning the plaintiff) “calls *self-acting tallow syphons or lubricators*” (meaning the said design, and meaning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid,) “stating that he” (meaning the plaintiff) “is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. Robert Harlow,” (meaning himself the defendant,) “brass-founder, Stockport, takes this opportunity of saying that such a patent does not exist, and that he” (meaning the defendant) “has to  
 \*627] offer an improved lubricator, which dispenses with the \*necessity of using more than one to a steam engine, thereby constituting a saving of 50 per cent. over every other kind yet offered to the public. Those who have already adopted the lubricators” (meaning the said de-

sign of the plaintiff, and meaning the goods and articles which the plaintiff has so sold and had on sale as aforesaid,) "against which R. H." (meaning himself the defendant) "would caution, will find that the tallow is wasted instead of being effectually employed as professed."

By means of which premises the plaintiff was greatly injured in his credit, reputation and circumstances, and was prevented from selling divers articles made according to the said design, and also divers of the said other articles and goods, which he might and otherwise would have sold, and was thereby prevented from acquiring divers great gains which he might and otherwise would have acquired, and was and is greatly injured in the way of his said trade and business and otherwise. To the plaintiff's damage, of &c.

General demurrer, and joinder. The ground stated in the margin of the demurrer was, "that there is nothing in the alleged libel which is actionable."

*R. V. Richards*, for the plaintiff, was called upon by the court. This is a libel on the plaintiff in respect of his trade, and by which he was prevented from selling his goods. It charges him with monopolizing high prices at the expense of the public, by stating a falsehood. Language not stronger than this was held actionable in *Harman v. Delany*, 2 Stra. 898, the court saying \*that "the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person." So in *Jones v. Littler*, 7 M. & W. 423, words spoken of a tradesman, though not with a direct reference to his business, were held actionable without special damage, because the jury found them to have been in fact spoken of him in his trade, and, even if not so spoken, they would necessarily tend to injure him in it. And in *Ingram v. Lawson*, 6 New Ca. 212, a libellous statement as to the condition of plaintiff's ship, being held to reflect not only on the ship but on the plaintiff in his business of a ship owner, was deemed actionable without special damage. Here special damage is averred, namely, that the plaintiff was prevented from selling divers articles made according to his patent design, and other articles and goods, before specified, which he had on sale. In complaining of such injury with respect to a general stock of goods, a plaintiff cannot state specifically who would have brought any particular part of them; to this extent *Hartley v. Herring*, 8 T. R. 130, applies: and, if so, the statement is not too wide for an averment of special damage. [\*628

*Badeley*, for the defendant, was then desired to proceed. The publication in *Harman v. Delaney*, 2 Stra. 898, was a libel distinctly reflecting on the tradesman in the way of his trade. Here the language is more general. It does not appear in that case what the innuendoes were. Here the count shows only a statement disparaging the plaintiff's goods: there is nothing to connect the \*plaintiff, as a subject of libel, with the goods; and that being so, the action does not lie without special damage; [\*629

*Malachy v. Soper*. 3 New Ca. 371. The inducement mentions a design of which the plaintiff is the registered owner; but the goods to which the libel relates are not connected with that design by any sufficient averment. The words complained of, as they appear on the record, are substantially nothing more than a fair criticism on articles which the plaintiff has for sale. Such a criticism on a work of art has been deemed not libellous; *Thompson v. Shackell*, Moo. & M. 187: and the principle of that case applies here. [PATTESON, J. The substance of the complaint here lies in the averment as to the plaintiff's trade, and the alleged libellous words cautioning persons not to employ him. The rest is nonsense.] The words contain nothing in which the court can clearly see a tendency to slander the plaintiff in his trade. Even after verdict the action upon them would not be maintainable; *Sweetapple v. Jesse*, 5 B. & Ad. 27; *Kelly v. Partington*, 5 B. & Ad. 645.(a) If it is meant that this libel charges the plaintiff with fraud in his trade, that meaning should have been pointed out by proper averments, the words themselves not necessarily suggesting it; *Forbes v. King*, 1 Dowl. P. C. 672; *Angle v. Alexander*, 7 Bing. 119; *Goldstein v. Foss*, 6 B. & C. 154; *Goldstein v. Foss*, in error, 4 Bing. 489. BEST, C. J., said in the last case: "The words do not naturally import that the plaintiff is a swindler; and we want an allegation of fact to prove that they were used in that sense." The same may be said of the supposed imputation of fraud here. In \*fact,

\*630] the defendant's statement is merely a caution by one tradesman against goods of another which are supposed not to answer their purpose: and, if it be no more than a puff by one of two rival tradesmen, recommending his own articles in preference to those of the other, it is defensible on account of the interest the defendant has in the subject matter, on the principle laid down in *Delany v. Jones*. 4 Esp. N. P. C. 191.(b) In such a case, at least, the intention to libel the plaintiff ought to be shown by very clear averments; *Stockley v. Clement*, 4 Bing. 162. The words "Those who have already adopted the lubricators, against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed," are not, indeed, ambiguous; but, if libellous, they only reflect upon the goods, and therefore are not actionable, according to the principle of *Malachy v. Soper*, 3 New Ca. 371, no prejudice to the sale, or other special damage, being alleged. The last mentioned case is referred to, and its doctrine not disputed, in *Ingram v. Lawson*, 6 New Ca. 212. [PATTESON, J. It does not appear by the declaration that the tallow syphons were, or were alleged to be, of the plaintiff's manufacture.]

*H. V. Richards*, contra. The whole tendency of the libel is to reflect on the plaintiff in the way of his trade. As to the omission of an averment that the goods were of the plaintiff's manufacture; assuming that they were

(a) See *Hearne v. Stowell*, 12 A. & E. 719.

(b) See *Lay v. Lawson*, 4 A. & E. 795, 798.

not so, the libel was still injurious to him if he had them on sale. The innuendoes referring to the design, if not maintainable, may be rejected, and the \*count still held good; *Harvey v. French*, 1 Cro. & M. 11; S. C., 2 Tyr. 585. The want of innuendoes has been held fatal [\*631] where the expressions used in the libel had a supposed meaning which the court could not judicially understand without an innuendo; as "Man Friday," in *Forbes v. King*, 1 Dowl. P. C. 672.(a) Here the court can interpret the words without such help. It cannot be lawful to say of a tradesman that, in the goods which he sells, material "is wasted instead of being effectually employed as professed." This is a direct imputation of deceit in the trade.

LORD DENMAN, C. J. I am of opinion that the statement complained of does not amount to a libel. It contains no real imputation upon the plaintiff of fraud or misrepresentation. There are indeed words intimating that the plaintiff stated himself to be the sole inventor and patentee of the lubricators, whereas no such patent existed; but it does not appear by the record that the plaintiff had or claimed to have any patent in respect of these. The gist of the complaint is, the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be "false, scandalous, malicious and defamatory" that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action. There is, in this case, a caution given by the defendant against the plaintiff; but it is not against fraud in him; it is simply on account of his selling defective \*goods. Any one selling the same articles would have as much right to com- [\*632] plain as he has. The imputation is only on the goods, and is not ground for an action.

PATTESON, J. A confusion is introduced here by bringing together things which have no connection. The inducement states that the plaintiff was the inventor and registered proprietor of an original design for modelling and making impressions on articles of manufacture in metals or mixed metals, and that he sold articles of manufacture on which the design was used. It states further that the plaintiff had on sale in the way of his trade self acting tallow syphons or lubricators. And then it alleges that the defendant published a libel cautioning parties "from a person offering what he calls self acting tallow syphons or lubricators, stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices," &c., whereas "such a patent does not exist;" and it then states, as the conclusion of the libel, "Those who have already adopted the lubricators against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed."

(a) See *Digby v. Thompson*, 4 B. & Ad. 821.

It is clear that these latter words refer to the syphons and nothing else. The history of the plaintiff's being inventor and proprietor of a design seems to have nothing to do with it. The declaration does not connect the two subjects. The inducement does not state that the syphons were articles on which the design was used; and the words "stating that he is the sole inventor, manufacturer and patentee" and "such a patent does not exist" are not referred to the design by any innuendo; nor is it averred that any patent applicable to the syphons did exist. The statement  
 \*633] comes to this, that the plaintiff had syphons on sale (not \*alleged to be of his own manufacture,) and the defendant (intending as is suggested in the declaration) wrote of and concerning them, and the plaintiff as the seller thereof, "this is to caution parties," &c., "from a person offering what he calls self acting tallow syphons or lubricators:" "those who have already adopted the lubricators, against which R. H. would caution, will find that the tallow is wasted," &c. This is not, in effect, a caution against the plaintiff as a tradesman in the habit of selling goods which he knows to be bad; if it were, it would be a libel upon him personally: but it is a caution against the goods, suggesting that the articles which the plaintiff sells do not answer their purpose; which is not actionable unless it were shown that the plaintiff, by reason of the publication, was prevented from selling his goods to a particular person.

WIGHTMAN, J.(a) The caution against the plaintiff as a person offering lubricators for sale seems to give as a reason that he has no patent: but the lubricators are not connected with any patent, nor with the design mentioned in the inducement. Then follows the paragraph "Those who have already adopted," &c., but there it is not alleged that the plaintiff knew the syphons to be such as the libel describes. If they had the defect imputed, he may have been unconscious of it; and that distinguishes the case from *Harman v. Delany*, 2 Stra. 898, where the libel said of a gunsmith that he did not dare "to engage with any artist in town." There the plaintiff was libelled as the manufacturer; here it is not suggested that he was so.

Judgment for defendant.

(a) Coleridge, J., was at the Central Criminal Court.

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\*HOLMES v. NEWLANDS.

To a declaration in scire facias to revive a judgment, the defendant pleaded that within a year after the judgment, plaintiff sued out a fi. fa. for the sum recovered, under which writ the sheriff entered and took possession of all the goods and effects in and upon the dwelling-house of defendant, situate, &c., and that the fi. fa. "was returned and filed on or about," &c., adding a verification, and concluding, "Wherefore inasmuch," &c., (referring to the matter of the plea,) "the said defendant prays judgment of the said writ of scire facias and declaration thereon founded, and that the same may be quashed, &c." On special demurrer.

Held a bad plea, on the grounds,

1. That the mere fact of an execution having been issued during the year is no answer to a scire facias brought after its expiration, though satisfaction of the demand under such execution would be an answer, in proportion to the amount recovered.
  2. That the plea did not state whose goods were taken.
- Judgment, that the plaintiff have execution.

SCIRE FACIAS, (December 2d, 1843,) to revive a judgment entered up by plaintiff against defendant, November, 25th, 1839, in an action of trespass.<sup>(a)</sup>

Plea. "And the said defendant in person saith that, within a year after the said judgment was signed, that is to say on the 25th day of November, A. D. 1839, there was issued out of this court, by and on behalf of the said plaintiff, a writ of fieri facias for the sum recovered under the said judgment, directed to the sheriff of the county of Surrey, under which he entered and took possession of all the goods, chattels and effects in and upon the dwelling-house of the said defendant, being No. 19 West Square Southwark, in the said county, and that the said writ of fieri facias was returned and filed on or about the 21st day of December, A. D. 1839; and this the said defendant is ready to verify; wherefore, inasmuch as the said plaintiff has come into this court within a year after the said judgment was entered up, and sued out the said writ of fieri facias, and has already obtained and is now in possession of the remedy which \*he now [\*635 seeks under the said writ of scire facias, and as the said writ of scire facias is given by the statute in that case made and provided as a remedy only to such as have not come into court within a year after the judgment is entered up, and sued out a writ of execution, and are therefore disabled from suing out a writ of execution without it, the said defendant prays judgment of the said writ of scire facias and declaration thereon founded, and that the same may be quashed," &c.

Demurrer, assigning for causes: that it is not stated in the said plea what goods and chattels, and what amount thereof, was seized by the sheriff as in the plea mentioned under the writ of fi. fa., or in whom was the property of the said goods and chattels, nor what was done with the said goods, or whether any sale took place under the said seizure; nor is it stated with sufficient or any certainty that the said fi. fa. was founded on the judgment in question, nor that the same can now be executed or continued; nor does the plea state by whom the fi. fa. was returned, or what return was made thereto, or to what court or place; nor is the time of the return alleged with sufficient or any certainty; nor is it shown thereby with sufficient or any certainty that the plaintiff can have execution of the said damages and interest without this suit; and that, although the fi. fa. is stated in the plea to have been returned and filed, yet it is not alleged in the plea that there is any record of the said fi. fa. and return or either of them; nor is reference made in the plea to any such record; nor does the plea conclude, as it ought, with a verification by the record; and also for that the plea does not give a better writ to the plaintiff; and it wrongly

<sup>(a)</sup> See *Newlands v. Holmes*, 4 Q. B. 858, and *Holmes v. Newlands*, ante, p. 367.

concludes by praying judgment of the writ and declaration and that  
 \*636] \*the same may be quashed, inasmuch as it does not consist of  
 matter of abatement; and that it ought not to have concluded by  
 praying judgment of abatement; and that, if a plea in abatement, it is bad for  
 want of a proper commencement in abatement, and is repugnant for com-  
 mencing in bar and concluding in abatement; and is in other respects, &c.

Joinder in demurrer.

*Willes* for the plaintiff. The plea is defective in not stating whose  
 goods were taken, or what return was made. And it proceeds upon the  
 essential mistake of assuming that a plaintiff cannot have a sci. fa. if he  
 has sued out execution during the year, with whatever result. There is  
 no authority for this position, nor any precedent of such a plea. The  
 proper answer to a declaration like the present is, "that the debt was  
 levied by fi. fa.;" Com. Dig. Pleader, (3 L. 15 :) not merely that execu-  
 tion issued. In *Wilbraham v. Snow*, 2 Saund. 47, it is laid down that the  
 sheriff, having seized goods under a fi. fa., may bring trover or trespass  
 against a party removing and converting them: and the reason given in  
 Serjt. Williams's note (a) is, that he is answerable to the plaintiff to the  
 value of the goods taken under the fi. fa.; and the defendant is discharged  
 from the judgment and all further execution, "if the sheriff has taken  
 goods to the amount of the debt," although he does not satisfy the plain-  
 tiff, or has not returned the writ: "and it will be a bar to a scire facias  
 on the judgment." The mere issuing of a fi. fa., if goods to the amount  
 of the debt were not taken, would clearly be no answer.

\*637] \*The plea commences in bar of the action, generally, but con-  
 cludes by praying judgment of the writ: the plaintiff, therefore,  
 is entitled to treat it as a plea in abatement; and, so considered, it is bad  
 because it does not give a better writ. As a plea in bar it would be de-  
 fective because it concludes in abatement; *Steward v. Hills*. (b)

*The Defendant* in person, contra. The Statute of Westminster the  
 second (1 stat. 13 Edw. 1, c. 45,) gives a scire facias in addition to  
 the common law remedy of an action on the judgment; but gives  
 it only to a plaintiff who has not sued out execution. If he has done  
 so, he has elected to take his common law remedy, and ought not to  
 require the aid of a scire facias. It has been held that a ca. sa. may be  
 executed more than a year and a day after the judgment, if sued out  
 within that time; *Simpson v. Heath*, 5 M. & W. 631; *Thomas v. Harris*,  
 1 Dowl. P. C. N. S. 793; *Greenshields v. Harris*, 9 M. & W. 774; and  
 the plaintiff, if his execution has not been effectual, may obtain fresh pro-  
 cess, the first having been returned. Actions of debt on judgment have  
 been discountenanced, "as being generally vexatious and oppressive, by  
 harassing the defendant with the costs of two actions instead of one;" 3  
 Bla. Com. 160; and, by stat. 43 G. 3, c. 46, s. 4, the plaintiff in such

(a) Note (1) to *Wilbraham v. Snow*, 2 Wms. Saund. 47 a: 6th ed.

(b) Note (a) to *Steward v. Greaves*, 10 M. & W. 723.

action cannot have costs of suit without leave of the court or a judge. But, if plaintiffs might declare in scire facias as well as sue out execution, the same abuse might be practised, and without limit as to costs, the statutes 8 & 9 W. 3, c. 11, s. 3, \*and 3 & 4 W. 4, c. 42, s. 34, giving costs to the plaintiff in scire facias even upon judgment by default, without the restriction imposed by stat. 43 G. 3, c. 46, s. 4. As to the objection that the return of the writ is not properly shown: if it appear that a writ was sued out, the court will intend a return, there being no allegation to the contrary; *Kinsey v. Heyward*.<sup>(a)</sup> That a verification by the record was not necessary appears from *Peter v. Stafford*, Hob. 244. As to the form of the plea: if it shows that no writ will lie, it is, substantially, a plea in bar, and the defendant will be entitled to judgment; *The Dundalk Western Railway Company v. Tapster*, 1 Q. B. 667. If it contains matter available in abatement, the court will abate the writ *ex officio*. [\*638]

*Willes* was not heard in reply.

LORD DENMAN, C. J. There is no authority to show that a scire facias will not lie in this case: and it is a new complaint that that proceeding should be adopted rather than an action on the judgment. If goods to whatever amount had been seized under the *fi. fa.* that might have been pleaded, as a satisfaction thus far. No statement appears, on this plea, of a full satisfaction, or any; and I think the plea is bad. My brother WIGHTMAN,<sup>(b)</sup> agrees in this opinion.

PATTESON, J. The statute<sup>(c)</sup> does not say that a \*scire facias may not issue after the year if any execution has been sued out within it. Several authorities show that it is a good plea to allege that a levy has been made for the debt: if the whole has been levied, it is a complete answer; if part, it is good for the purpose of showing that the plaintiff ought not to have execution as to so much. But this plea is merely that the sheriff "entered and took possession of all the goods, chattels and effects in and upon the dwelling-house of the said defendant," (not saying whether they were his or not,) and that the *fieri facias* "was returned and filed on or about," &c. As to the allegation of a return, supposing the plea good at all, it is so on the ground only that a writ of execution was sued out within a year, and therefore a scire facias could not issue: if that be so, the return is immaterial: if it be material, the plea ought to have shown that the writ was filed of record. But I think that the plea is altogether ill pleaded.<sup>(d)</sup> [\*639]

*The Defendant* then suggested that the judgment must be *respondeat oster*.

(a) 1 Ld. Ray. 432, 435. But the judgment there was reversed in K. B., and the judgment of K. B. affirmed in Dom. Proc. See *ibid.* And see *Brown v. Babbington*, 3 Ld. Raym. 880.

(b) Wightman, J., had left the court during the argument.

(c) 1 stat. 13 Ed. 1, c. 45.

(d) Coleridge, J., was at the Central Criminal Court.

Lord DENMAN, C. J. No. The plea is not a plea in abatement for that purpose.

PATTESON, J. The judgment must be that the plaintiff have execution.  
Judgment accordingly.

\*640] \*The QUEEN v. The Inhabitants of the Borough of  
LEOMINSTER.

A pauper having been removed to parish A., by an order directed to the churchwardens and overseers of A., notice of appeal and grounds of appeal was served, purporting to be signed by M. "churchwarden," and M. and N. "overseers." M. was the survivor; two churchwardens had been appointed, of whom M. and N. had also been appointed the only overseers; but which appointment took place first did not appear. *Held*, that the appellants were entitled to be heard, upon this notice.

ON appeal against an order of two justices, removing William Pierce, otherwise Loveridge, and Mary his wife, from the borough of Leominster in Herefordshire to the parish of Addington in Buckinghamshire, the sessions quashed the order, subject to the opinion of this court upon the following case.

At the trial, the appellants being called upon to prove their notice of appeal, it appeared that a notice and statement of grounds of appeal had been served upon the officers of the respondent parish fourteen clear days at least before the sessions. The case then set out the document containing the notice and grounds, which was dated 11th March, 1843, and commenced "to the churchwardens," &c. "We, the churchwardens and overseers of the poor of the parish of Addington," &c., and was signed as follows.

"John Clare, Churchwarden.

"John Clare,  
"Matthew Adams, } Overseers of the poor."

At the time of the said notice and statement of grounds of appeal being signed and given, the persons whose signatures are affixed thereto were the only existing parochial officers of the appellant parish, whether churchwardens or overseers. John Clare, who signed the above notice and statement of grounds of appeal as churchwarden, was the same person who also signed it as one of the overseers. Clare and Adams, by whom  
\*641] \*the said notice and statement of grounds of appeal is signed,  
were in fact appointed overseers of the appellant parish in the year 1842. Clare was one of the churchwardens of the appellant parish, and continued to be such churchwarden until after the giving of the said statement of grounds of appeal, and the trial of the said appeal. There had been another person appointed churchwarden, as well as Clare; but that person had died in October, 1842, before the time at which the said notice of appeal was given; and no successor to the deceased churchwarden had been appointed. It was objected by the respondents that,

under the circumstances, the appellants could not be heard in support of their appeal, inasmuch as the said John Clare and Matthew Adams, by whom the said notice of appeal was signed, did not, at the time of signing the said notice, legally constitute either the churchwardens and overseers of the poor, or the churchwarden or the overseers of the poor, of the appellant parish; and because, at the time of giving the said notice of appeal, there was no body of churchwardens or of overseers of the poor of the appellant parish, legally constituted in that behalf, and competent to give the said notice of appeal, or any other notice of appeal, against the said order of removal; and also because a statement of the grounds of appeal in writing had not been sent or delivered to the churchwardens and overseers of the respondent parish by the churchwardens and overseers of the poor of the appellant parish, inasmuch as the said John Clare and Matthew Adams, by whom the said statement was sent or delivered to the churchwardens and overseers of the poor of the respondent parish, were not, for that purpose, the legally constituted churchwardens and overseers of the appellant parish, or a majority thereof: and because, at the time at which the said statement of the grounds of appeal was so sent or delivered as aforesaid, there was no body of churchwardens and overseers of the poor of the appellant parish legally constituted in that behalf, and competent to send or deliver to the churchwardens and overseers of the respondent parish the said statement of grounds of appeal, or any other statement of grounds of appeal, against the said order of removal. Upon the above objections, the court of quarter sessions decided that the appellants were entitled to be heard in support of the appeal, and proceeded to try the same, and quashed the order of removal.

[\*642]

If this court should be of opinion that the appellants were not entitled to be heard in support of the appeal, the order of sessions was to be quashed and the order of removal confirmed; but, if the court should be of opinion that the appellants were entitled to be heard in support of the appeal, the order of removal was to stand discharged, and the order of sessions to be confirmed.

The case was argued in last term.(a)

*B. Andrews* and *Barrett* in support of the order of sessions. The respondents are not entitled to object to the notice of appeal on the ground of the supposed deficiency in the number of officers; the appellants could not have objected to the service of the order of removal:(b) \*and the estoppel must be mutual. The persons acting as officers de facto were bound to receive; if not, there has been no good service of the

[\*643]

(a) January 20th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

(b) The order of removal was addressed: "To the churchwardens and overseers of the poor of the borough of Leominster, in the county of Hereford, to execute and convey, and to the churchwardens and overseers of the poor of the parish of Addington, near Buckingham, Buckinghamshire, to receive and obey. Forasmuch as complaint," &c. No name of the officers of either parish appeared.

order of removal, and no good delivery of the pauper to the appellant parish. COLERIDGE, J. The respondents know nothing of the appointments: they remove to the parish; but they do not treat the particular individuals as officers.] If the persons acting de facto are not good officers for this purpose, there are no such officers; and indeed it is contended, on the other side, that no good notice of appeal could be given at all. If that were so, the parish would be obliged to suspend all acts requiring officers till a peremptory mandamus could be obtained. In *Rex v. All Saints, Derby*, 13 East, 143, it was held that, under stat. 43 Eliz. c. 2, s. 5, which provides for binding parish children apprentices by "the said churchwardens and overseers, or the greater part of them," the binding was not valid where it was made only by two overseers, one of whom was sole churchwarden and had been appointed also overseer, inasmuch as sect. 1 requires that the overseers shall consist of the churchwardens and four, three or two substantial householders. That decision was on the ground that the full legal number were requisite to execute the statutable authority to bind; here the thing done is merely a ministerial act, a notice on behalf of the parishioners. And stat. 51 G. 3, c. 80, s. 1, reciting that "in divers small parishes two persons only have been annually appointed to act in the capacity of \*churchwardens as well as overseers of the poor," and that indentures have been holden void for not being signed by distinct persons as churchwardens and overseers, makes such indentures, past and future, good, but does not treat the appointments themselves as illegal. It makes valid indentures "executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as of overseers of the poor:" and, in *Rex St. Margaret's, Leicester*, 2 B. & Ald. 200, it was held that this applied to the case where one only overseer was churchwarden, as here. Stat. 13 & 14 C. 2, c. 12, s. 1, authorizes a removal "upon complaint made by the churchwardens or overseers;" and sect. 2 gives the appeal generally, to "all such persons who think themselves aggrieved;" which is also the language of stat. 3 & 4 W. & M. c. 11, s. 10. The first statutory provision making requisite the interference of parish officers in an appeal was in stat. 9 G. 1, c. 7, s. 8; which enacted that no appeal against a removal should be proceeded upon at quarter sessions, "unless reasonable notice be given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal, unto the churchwardens or overseers of the poor of such parish or place, from which such poor person or persons shall be removed." Stat. 17 G. 2, c. 5, s. 26, afterwards gave a right of appeal as to matters under that act to any persons aggrieved, giving reasonable notice thereof. Stat. 4 & 5 W. 4, c. 76, makes no difference as to notices of appeal; *Rex v. The Justices of Suffolk*, 4 A. & E. 319. Where there are two overseers and a churchwarden, a notice by \*the two overseers is enough; *Rex v. The Justices of Derbyshire*, 6 A. & E. 885; that being a majority of the whole: the

same principle is adopted in *Rex v. The Justices of Warwickshire*, 6 A. & E. 873, where also it was held that service on a single officer, having the management of the poor, is enough; and, in the interpretation clause, sect. 109, of stat. 4 & 5 W. 4, c. 76, the word "overseer" is declared to include churchwardens or any officer employed in carrying into execution the laws for the relief of the poor. [Lord DENMAN, C. J. "So far as they are authorized or required by law to act in the management or relief of the poor."] Churchwardens, if there were no other overseers, might appeal by themselves. [COLERIDGE, J. We give a mandamus absolute in the first instance to appoint overseers, because no valid rate can be made without them.] That is because stat. 43 Eliz. c. 2, s. 1, gives the power of rating only to the overseers constituted of the churchwardens and at least two other householders, "or the greater part of them." In *Rex v. The Justices of Denbighshire*, 1 B. & Ad. 616, a parish, M., was divided into three districts, each supporting its own poor and appointing a single overseer; and the parish had two churchwardens; but no overseers were appointed for the whole parish: an order was made to convey paupers to M., and deliver them to the churchwardens and overseers of the poor there; and the pauper was in fact delivered to an overseer of one of the districts: an appeal was entered by that overseer and two inhabitants, and notice given by them; and a notice was also given by two overseers, appointed for the district after the entry of appeal; and it was \*held that the sessions did right in trying the appeal. According to the principle [\*646 which must be contended for on the other side, no notice could have been given at all in that case. In *Regina v. The Justices of Cheshire*, 8 Dowl. P. C. 616, the sessions refused to hear an appeal, because one of the two overseers who had been appointed was supposed to have a ground of exemption: but COLERIDGE, J., ordered a mandamus to compel a hearing, the other overseer and the two churchwardens having given notice of appeal. The sessions here were entitled to receive evidence that the officers giving the notice were in fact a majority of the existing officers; *Regina v. Church Knowle*, 7 A. & E. 471. Under stat. 8 & 9 W. 3, c. 30, s. 1, a certificate is good if signed by a majority of the parish officers de facto as distinguished from the parish officers de jure; *Rex v. Wymondham*, 6 T. R. 552.(a) In *Rex v. Hinckley*, 12 East, 361, an indenture of apprenticeship was signed only by one churchwarden and one overseer; and the court held that, in default of evidence to the contrary, it might be intended that the place had by custom one churchwarden only, and two overseers: and then a majority would have signed, so as to satisfy stat. 43 Eliz. c. 2, s. 5. In *Rex v. Catesby*, 2 B. & C. 814, a certificate, under stat. 8 & 9 W. 3, c. 30, s. 1, was signed by one churchwarden only and one overseer; and the court intended that there was by custom but one churchwarden, and that two overseers had been appointed, one of whom had died. It is true that in *Rex v. Clifton*, 2 East, 168, it was held that

(a) See *Rex v. Clifton*, 2 East, 168, 175.

\*647] a certificate, under the same statute, signed by \*an overseer who had been appointed singly, was bad, because an appointment of one overseer only was invalid; but in that statute the authority to certify is given only to “the churchwardens and overseers,” “or the major part of them,” or “the overseers of the poor” “where there are no churchwardens,” using the plural throughout. So in *Woodcock v. Gibson*, 4 B. & C. 462, it was decided that stat. 59 G. 3, c. 12, s. 17, which makes “churchwardens and overseers” a corporation for the purpose of holding parish property, could not be applied where one of two overseers was appointed sole churchwarden, as there was no body answering to the statutory description. These two cases, being decided on the peculiar requisites and wording of the statutes, do not apply here.

*Greaves and Venables*, contra. No valid notice of appeal could be given in this case: the parish had no overseers besides the churchwarden; for the appointment of Clare was absolutely void, if he was then churchwarden; and therefore Adams was appointed singly, which is a void appointment; or, if Clare was appointed churchwarden after he was appointed overseer, then his appointment as churchwarden was void, or else it vacated the office of householder overseer. Stat. 43 Eliz. c. 2, s. 1, distinctly requires that, besides the churchwardens, there shall be at least two overseers. The notice itself purports to be given by the churchwarden and overseers. The parish officers do this, not simply as a ministerial act, but as the act of trustees on behalf of the parish. It may be

\*648] that, if these parties were \*proceeded against in the character of parish officers, they would be estopped by their own conduct from denying that character; but the question here is whether they have put themselves into court: and they cannot do that by any thing which operates merely as an estoppel against themselves. The cases, which have been cited, of intendments made in favour of the fact of the character are all instances where the presumption was against the parties supposed to hold such character, or the parish represented by them; and this is reasonable, since otherwise they would be enabled to effect a fraud on other parishes. But how can such a principle be applied to establish a presumption in their favour and against other parishes? It has been argued that stat. 13 & 14 C. 2, c. 12, s. 1, and stat. 9 G. 1, c. 7, s. 8, give the power of appeal and notice to the churchwardens or overseers in the alternative. But the alternative applies only in cases where there can be no churchwardens; for instance, in a township, as in *Rex v. The Justices of the North Riding*, 6 A. & E. 863. And now, under stat. 4 & 5 W. 4, c. 76, s. 81, the notice of grounds of appeal must be given by the “overseers or guardians.” And, at any rate, all the statutes assume the existence of a legal body of parish officers. *Rex v. Clifton*, 2 East, 168, and *Woodcock v. Gibson*, 4 B. & C. 462, show that an appointment of householder overseers not being two persons distinct from the churchwardens is bad: and so is an appointment of more than four overseers; *Rex v. Lox-*

*dale*, 1 Burr. 445. That there must (except where there is a special custom, as in *Rex v. Earl Shilton*, 1 B. & Ald. 275) be two churchwardens \*appears from *Rex v. The Rector, &c., of Birmingham*, 7 A. & E. 254. [PATTESON, J. In the present case, two having been originally appointed, the death of one could not make the other no longer a churchwarden. But it is argued on the other side that, even if these be not legally officers, they could still give the notice of appeal.] To enable officers to perform the act, they must be legally appointed; *Rex v. St. Margaret, Leicester*, 8 East, 332, in the case of a certificate under stat. 8 & 9 W. 3, c. 30, s. 1, agreeing with *Rex v. Clifton*, 2 East, 168; *Rex v. All Saints, Derby*, 13 East, 143, in the case of an indenture of apprenticeship under stat. 43 Eliz. c. 2, s. 5. In *Blacket v. Blizzard*, 9 B. & C. 851, 857, BAYLEY, J., said; "I take it to be a general rule of law, that where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary;" and he referred, among other cases, to *Rex v. Beeston*, 3 T. R. 592, as a case in which this was considered to be clear. Stat. 51 G. 3, c. 80, recognises the propriety of the decisions which treated certificates as "void," if not executed by the proper number of distinct officers, and alters the law in one case only, thus affirming the general principle. In *Doe dem. Churchwardens of Llandysilio v. Roe*, Tyrwh. & Gr. 1084, it was contended that an ejectment for parish property, under stat. 59 G. 3, c. 12, s. 17, must be on the demise of the officers by name and title, and not merely by title, in order to show that the proper number exists; and the court so ruled. No hardship can arise. Stat. 17 G. 2, \*c. 38, s. 3, provides for the appointment of a successor to an overseer dying in office: it is scarcely possible that parties cannot be found for the office, as the courts construe the liability to serve parish offices very extensively, so as, in the case of a churchwarden, to include even non-resident partners in a banking concern carried on in a house in the parish; *Stephenson v. Langston*, 1 Hag. Con. R. 379. The interpretation clause, sect. 109, of stat. 4 & 5 W. 4, c. 76, as has been pointed out, does not extend the word "overseers" to all parties acting de facto, but only "so far as they are authorized or required by law to act." The argument for the respondents, here, is much strengthened by the cases which have been cited, on the other side, of intendments of fact by the court; for these show that, but for such intendment, the acts would have been held void: and here the findings of the case exclude any intendment of the kind. If any act were justified as done by the authority of such officers, and the record showed the objection, the justification would fail on demurrer. Thus where a rate is disputed for want of jurisdiction, the question may be raised in an action at law, on demurrer; *Governors of Bristol Poor v. Wait*, 1 A. & E. 264. The different modes of disputing the propriety of the appointment of overseers are enu-

rated in 1 Nol. P. L. 35—39, (ed. 4 ;) where *Rex v. Denham*, Burr. S. C. 35, and *Rex v. Tamworth*, Cald. 28, are referred to, as showing that the question may be raised on appeal against an order of removal. In 16 Vin. Abr. 114, tit. *Officer and Officers*, (G. 4,) the cases are collected in which  
 \*651] acts are good when done by an officer de facto \*who is not so de jure; and they are all instances of colourable appointments: but there can be no such appointment as of a single overseer, except in successorship to a deceased overseer. In *Doe dem. Nicholson v. Middleton*, 3 Br. & B. 214, it was held that, where three commissioners and their successors, or any two of them, were empowered to act, two could not act after the death of a third till his successor was appointed. Statutes have repeatedly been passed to remedy the inconvenience of acts done by parish officers improperly appointed; as stat. 51 G. 3, c. 80, stat. 54 G. 3, c. 107, stat. 1 & 2 G. 4, c. 32: but these apply only to particular cases, and therefore confirm the general principle. In *Rex v. Clifton*, 2 East, 174, GROSE, J., said: “there is a good reason for requiring the concurrence of the proper officers in these instances: because it is a discretionary act which is to bind the inhabitants; and if the proper number of overseers had been appointed, the inhabitants would have had the benefit of their consideration.” It is only through the parish officers that the parish can appeal; individuals cannot do so; *Regina v. Colbeck*, 12 A. & E. 161. In *Rex v. The Justices of Denbighshire*, 1 B. & Ad. 616, the court only refused to interfere by certiorari: and, besides, the proper number of overseers had been ultimately appointed, and had concurred in the appeal.  
 Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court.

On the trial of this appeal, the respondents objected, as the case states,  
 \*652] that the persons by whom the notice \*of appeal was signed did not legally constitute either the churchwardens and overseers of the poor, or the churchwardens or overseers of the poor, of the appellant parish: and because there was no body of churchwardens and overseers competent to give the said notice. It appeared that Clare was one of the churchwardens; that another person had been appointed churchwarden, who died before the notice of appeal was given; and no successor had then been appointed. Clare signed the notice twice; once as a churchwarden, once as overseer.

We think the sessions perfectly right in proceeding to try the appeal, in spite of this novel objection, for which there could be no reasonable foundation, unless the appellant parish were free to repudiate the acts of their officers. But we are clearly of opinion that they are bound by their acts, and must submit to any judgment against those whom they have represented as having power to act for them, unless the document were invalid on its face. The respondents, therefore, would have had all the benefit of a decision on the merits, if in their favour, and are not at liberty

to enter into the legality of the several appointments in the adverse parish.

Order of sessions affirmed.(a)

(a) See the next case. Also *Regina v. Westbury*, ante, p. 500, and the cases there following.

\*The following case may conveniently be added here. [\*653

### The QUEEN v. The Inhabitants of BEDINGHAM.

Under stat. 13 & 14 C. 2, c. 12, s. 1, the complaint upon which an order of removal is made need not be in writing. Therefore, where a written complaint was made to the removing justices, signed by only one overseer, and purporting to be his complaint, but it was shown at sessions that the complaint was in fact made with the concurrence of all the parish officers, that was held to warrant an order of removal purporting to be made on the complaint of the overseers, though it did not appear that evidence of such concurrence had been laid before the removing justices.

An examination stated a hiring and service, and relief given by the appellant parish during the pauper's residence elsewhere. The appellants, in their notice of grounds of appeal, alleged that the pauper never acquired a settlement in the appellant parish by such hiring and service, "or by any other means." At the trial, the respondents proved only the relief.

*Held*, that the appellants, in answer, were entitled, under their notice, to show that the relief was given by mistake, and that the respondents had subsequently relieved the pauper while resident in their parish.

On appeal against an order of two justices, whereby Peter Quantril, his wife and children, were removed from the parish of Bedingham to the parish of Earsham, both in Norfolk, the sessions quashed the order, subject to a case which, so far as relates to the points decided by this court, was as follows.

The order of removal was in the common form, directed "to the overseers of the poor of the parish of Bedingham, in the county of Norfolk, and to the overseers of the poor of the parish of Earsham, in the county of Norfolk, and to each and every of them;" and it recited that "complaint hath been made unto us, whose names," &c., "by the overseers of the poor of the said parish of Bedingham." The information (sent up, with the other documents, on the certiorari,) upon which the two justices acted, was in writing, signed "John Smith," and was sworn before the removing justices. It commenced thus. "The information and complaint of John Smith, of the parish of Bedingham, in the said county of Norfolk, farmer, taken upon oath," &c.: "Who saith: I am one of the overseers of the poor of the parish of \*Bedingham, in the said [\*654 county of Norfolk. Peter Quantril," &c., (stating that the pauper's family had come to inhabit in the parish of Bedingham, not having gained a settlement there or produced a certificate, and had then actually become chargeable to the parish:) "wherefore I pray that the said Peter Quantril may be examined," &c.: "I further state that," &c., (inability of one of pauper's family to attend.)

The order was made also upon the examination of the pauper, Peter Quantril. He therein deposed to having let himself to John Spilling, of Earsham, and having served him for a year, (under circumstances which it is not necessary to detail;) and that he had since done nothing to gain another settlement any where. That he was then single, but was afterwards married, and had children by the marriage. "In several of my wife's confinements, on the birth of the above children, and whilst residing in the parish of Beddingham, I have been allowed by the overseers of the parish of Earsham, at the expense of that parish, a surgeon to attend my wife: and, whilst residing in Beddingham, I have been repeatedly relieved by the overseers of Earsham with money. From the second year of my marriage, down to about five years ago, I have received from the overseers of Earsham, though living in Beddingham all that time, some money distributed, from a parish charity of Earsham, to persons belonging to Earsham."

The appellant parish of Earsham gave a notice of appeal with the following grounds, among others.(a)

\*655] \*1. That the said order was not, and does not purport to have been, made upon the complaint of the overseers of the poor of the said parish of Beddingham, but of John Smith only, described as being one of such overseers: and it does not appear, upon the face of the information of the said John Smith, upon which the said order is founded, that he was authorized by the churchwardens and overseers, or by the overseers or guardians, of the said parish of Beddingham to make such complaint and information on his own and their behalf.

5. That, if the said Peter Quantril was hired by the said John Spilling for a year, such hiring was dissolved before the expiration of the year: and that the said Peter Quantril never acquired a settlement in the said parish of Earsham, either by hiring and service with the said John Spilling, or by any other means.

Upon the trial, as to the first ground, it was admitted that the application was made on behalf of the parish officers, and with their consent: and the court decided this point in favour of the respondents.

Evidence was then given, by the respondents, of relief given by the appellant parish, out of the poor rate of that parish, to the pauper occasionally for a period of twenty years, whilst he was residing in the respondent parish: and the respondents then closed their case. The appellants then called on the court to allow them to show that such relief had been given under the mistaken belief that the pauper had gained a settlement in their parish by his hire with Spilling, as stated in the said examination. To this the respondents objected, on the ground that the notice did not state

(a) The grounds not here set forth raised objections to the removal, of which some were discussed in the argument: but the court pronounced no direct decision upon them. They related principally to alleged want of particularity in the examinations.

that as one of the grounds of appeal. The court then permitted the appellants to call the pauper with reference to this \*point; who, on examination, also admitted that, seven or eight years previous to the present order, he was examined before magistrates at a petty sessions respecting his settlement, on the application of, and whilst he was residing in, the respondent parish; who refused to make an order: since which he had been relieved several times by the respondent parish whilst resident in it. [\*656]

The court quashed the order of removal, subject to a case for the opinion of the Queen's Bench, upon the following points.

1. Whether there had been a sufficient complaint to give the magistrates jurisdiction to make the order; and whether the examinations upon which the said order was made are sufficient in law to support it.

2. Whether the court ought to have admitted the appellants to give the evidence objected to.

The order of sessions to be quashed or confirmed, as the court may decide the questions submitted to them.

*B. Andrews* and *Gunning* in support of the order of sessions. First, the complaint was insufficient: and on that point, as well as the other, the sessions ought to have quashed the order of removal. One overseer only complains: but stat. 13 & 14 C. 2, c. 12, s. 1, authorizes the removal only "upon complaint made by the churchwardens or overseers of the poor of any parish." The complaint is essential; an order of removal not setting out a complaint is bad; *Rex v. Hareby*, Andr. 361; *Weston Rivers v. St. Peters*, 2 Salk. 492. A notice of application for an \*order of maintenance, under stat. 4 & 5 W. 4, c. 76, s. 73, must be given by a majority of the aggregate body of churchwardens and overseers; *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480. Under stat. 18 G. 3, c. 19, s. 5, the appeal is given to "the overseer or overseers;" yet the majority must concur; *Rex v. The Justices of Lancashire*, 5 B. & Ald. 755. In *Regina v. Westbury*, (a) it was decided that the majority must concur in a notice of chargeability under stat. 4 & 5 W. 4, c. 76, s. 79. The same rule obtains wherever a public trust is to be executed by a body; *Rex v. Beeston*, 3 T. R. 592; *Grindley v. Barker*, 1 B. & P. 229. If the rule were otherwise here, a single overseer might obtain an order of removal when the majority of the parish officers were opposed to his doing so. [\*657]

Secondly. The sessions were right in receiving explanation of the relief, and quashing the order. No evidence having been given of the service, and the respondents insisting upon the relief, the appellants, not disputing the fact of the relief, were entitled to explain it. They gave notice of this, by denying that the pauper was settled, either by hiring or service, "or by any other means." If the relief be relied upon only as the proof of the

(a) Ante, p. 500. And see the cases there following. Also *Regina v. Leominster*, ante p. 640.

hiring and service, the appellants were entitled to meet that, under their denial of the settlement of hiring and service, by showing that the relief was given through mistake: if it was set up as a distinct ground of settlement, then there is an express traverse that there is any such settlement; which is supported by proof that the relief was not such as could give a settlement. The more correct view \*appears to be that relief is  
 \*658] not itself a ground of settlement, but evidence of the existence of some settlement, and therefore one of the "grounds of removal," in the language of stat. 4 & 5 W. 4, c. 76, s. 81.

*Archbold and Palmer*, contra. First, if the complaint required any signature at all, there certainly should have been the signatures of a majority. But no signature is required; the complaint need not be in writing. All that is requisite is, that the complaint should be the act of the majority; and here that was proved to be the case. One of the body, or even a third party, if authorized by the majority, may act for all. [Lord DENMAN, C. J. Does it appear that the fact of the authority was shown to the removing magistrates?] That is immaterial: the jurisdiction existed if the complaint was in fact made on behalf of the majority. It is true that the order of removal must show that the removal is on complaint by the aggregate body of officers; but this order does so.

Next, the sessions were wrong in admitting the explanation of the relief, under this notice of objection. The relief was not set up as evidence of the hiring and service: it is a distinct ground of settlement, independently of any other settlement which may be named; *Regina v. The Justices of Carnarvonshire*, 2 Q. B. 325; *Regina v. Camrose*, 2 Q. B. 330, note (a). The appellants were therefore bound, in their grounds of appeal, either to deny the relief, or, if they admitted it, to show how they answered the fact. That is not done by a general denial of settlement. The relief, therefore, not being expressly pointed to by the notice, is admitted as a good ground  
 \*659] of removal; \**Regina v. Hockworthy*, 7 A. & E. 492, 496. [PATTERSON, J. Suppose the only ground of removal in your examination had been the relief; and the appellants, in their notice of grounds of appeal, had expressly admitted the fact of relief, but had gone on to deny any settlement.] That might possibly have given the respondents warning of the kind of answer which was to be set up; but this notice is otherwise framed.

Lord DENMAN, C. J. It appears to me that the sessions have decided rightly on both the questions which we have to consider. The first is, whether there was a sufficient complaint to the removing justices. I think there was: it was made by the authority of all the parish officers. The second question is, whether it was proper to admit evidence on the part of the appellants, explaining the relief. I think it was. The examination states the fact of relief and the particular manner in which it was given: a settlement by hiring and service is alleged before. My brother PATTERSON, showed that, since the relief might be given under circum-

stances which prevented it from furnishing evidence of a settlement, it was competent to the appellants to explain the relief under a notice denying the settlement. I think the case stronger still when the examination sets up a distinct settlement, besides showing the relief. The appellants do not, indeed, expressly say that they admit the fact of relief, and that it was given by mistake; nor do they deny the fact of relief; but they say that there was no settlement. Under this statement they were entitled to show that no settlement was gained, though the relief was given: and they got rid effectively of the \*evidence of the relief by showing that it was given by mistake, and that afterwards relief had been given by the respondent parish. [\*660]

PATTESON, J. I think the sessions have done right. Stat. 13 & 14 C. 2, c. 12, s. 1, does not require the complaint to be in writing: it is enough that it should really be the complaint of the parish officers; and it is admitted to be so here. Mr. *Andrews* argued that a complaint signed by a single overseer might be obtained against the wishes of the others: but I rest on the circumstance that the complaint here is really the complaint of all. Next, I think the evidence of the mistake was properly admitted. The examination states that relief was given by the appellant parish to the pauper while resident elsewhere; the appellants, in their notice, do not deny the fact, but say, in effect, that this is no ground of removal, inasmuch as, when explained, it shows no settlement.

WILLIAMS, J. It appears to me that Mr. *Archbold* gives the proper answer to Mr. *Andrews's* first point. The objection applies only to the jurisdiction of the justices. No doubt the complaint must be made by the parish officers; but here the case finds that the complaint was in fact so made. Then, as to the question whether the appellants were properly permitted to show that the relief had been given by their parish under a mistake, I think the evidence was rightly admitted. The examination states a hiring and service, which is a ground of settlement, and then relief, which is evidence of settlement. At the sessions, the respondents have recourse only to the relief, and thereby furnish \*abundant evidence of settlement; and I cannot see why the appellants are not, under a denial of the settlement, entitled to meet that evidence by showing that the relief was given under a mistake. [\*661]

WIGHTMAN, J. I am of the same opinion. The complaint is not required, by stat. 13 & 14 C. 2, c. 12, s. 1, to be in writing: and there is no objection to the order itself. The objection to the evidence of mistake might perhaps be a good objection if the relief were in itself a substantive settlement. But it must be understood as evidence of some settlement not otherwise proved. Mr. *Archbold* says that this is not a proper confession and avoidance of the relief. But suppose the hiring and service to be abandoned: it would be a formal and proper answer to the remaining part of the examination to say that, although the relief was given, there was no settlement: a more specific answer could not be given. It

cause the settlement which the relief is to prove does not appear. They do give the proper notice here, in effect; for they do not deny the relief, and they do say that there is no settlement. Order of sessions affirmed.

\*662] \*The QUEEN v. The Inhabitants of PILKINGTON.

Justices removed to the township of P., as upon a settlement by hiring and service, on the pauper's examination; which stated that he went to work at C.'s factory called R. Mill, in the township of P.; that there was a custom in the mill, under which he worked, requiring the workpeople to give a fortnight's notice before leaving C.'s employment; that he remained in C.'s employment better than two years, residing and sleeping in P.; that the works consisted of two mills; that, when he wanted to leave the first mill, after working there a year, to go to the other, he had to give a fortnight's notice; that, after working in the other a year, he wished to leave, but was not allowed to do so without a fortnight's notice, and that he afterwards left on receiving a fortnight's notice from the overlooker.

*Held*, that from this examination the justices might infer a yearly hiring, and that the examination was sufficient, though the pauper stated only the facts from which the inference resulted, and not the fact inferred.

On appeal, the sessions confirmed the order, subject to a case setting out the evidence on the trial, which agreed with the examination except so far as it varied in the following particulars.

Pauper went to work as a piecer at C.'s first mill, to serve the person working the mill as master spinner, who was C. The practice of the mill is that the piecers assist spinners to whom they are attached; the master spinner pays the spinner the whole wages in proportion to the work done: the spinner pays, engages and dismisses the piecer, without the master spinner's interference. Pauper was engaged in this way at the first mill, by a spinner, at wages of so much per week, paid every fortnight, a fortnight's notice ending at any week being required before quitting. The second mill was worked by M., who took it of C., had the sole management of it, and spun by commission for C., at so much per hundred weight of yarn spun: but the mill was under the superintendence and control of C. Pauper engaged with M., to work as a spinner, and be paid according to the quantity of work done: nothing was said as to how long he was to remain; the same understanding, as before, prevailed as to notice. He received his wages every fortnight from M.'s manager.

*Held*, that, on this evidence the sessions were warranted in finding, if they so thought fit, a yearly hiring to, and service with, C. And this court confirmed the order of sessions, assuming that the sessions had pursued the course proper in stating a case, and therefore intended to state their own finding of the fact, subject to the opinion of this court whether the evidence warranted the finding, and had not intended to ask this court to find the fact.

On appeal against an order of two justices, removing Christopher Morley and his family from the township of Preston to the township of Pilkington, both in Lancashire, the sessions confirmed the order, subject to the following case.

The order was grounded on the following examination of Christopher Moreley, relating to the settlement of himself and his family, taken 30th September, 1842, "When I was about fifteen years of age, I went to work at Messrs. Crompton & Ditchfield's factory, called Ringley Mill, in Outwood, in the township of Pilkington. It was about the latter end of the year 1828.

\*663] There was a \*custom in the mill, requiring the workpeople to give a fortnight's notice before leaving their employment. I re-

mained in their employment better than two years; during the whole of which time I resided in Outwood, in the said township of Pilkington, and slept there. I worked under the custom as to giving notice. The works consisted of two mills, adjoining each other; and, when I wanted to leave the first mill (in which I had been working for about a year) to go to the other mill, I was compelled to serve a fortnight's notice before leaving. The second mill was under a similar custom; and, after I had worked in it better than a year, I had a dispute with the overlooker, and wanted to leave at once, but was not allowed. The overlooker afterwards gave me a fortnight's notice; at the end of which time I left the factory. I have not since done any act to gain a settlement in my own right. I was lawfully married about six years ago," &c. (The remainder of the examination is not material to the points discussed.)

The appellant township served the respondent township with the following notice and grounds of appeal. (The following part of the grounds of appeal is all that related to the points discussed.) "That the examination upon which the said order of removal was made does not show any settlement in the township of Pilkington. That the said examination does not contain any legal evidence of the settlement of the persons removed. That the examination is bad upon the face of it, and does not warrant any order of removal. That the said examination does not state sufficient facts to show that the said Christopher Morley gained a settlement by hiring and service in Pilkington. That there was no such hiring or service at Messrs. \*Crompton & Ditchfield's factory, or residence, in the township of Pilkington, as in the examination in this case is alleged. That the said Christopher Morley was not legally settled in the township of Pilkington." [\*664

The appeal came on to be heard at the sessions; when the appellants objected to the sufficiency of the examination, inasmuch as no general or yearly hiring was stated in or could be implied from the examination, the examination merely stating that the examinant went to work at Messrs. Crompton & Ditchfield's factory called Ringley Mill, without stating that he was hired at all, nor with whom he purported to make a contract or to engage, nor that he made any contract at all. The appellants also objected that there was no allegation in the examination that the paupers were settled in the appellant township. The sessions overruled these objections, subject to the opinion of the Court of Queen's Bench.

The following facts were proved on behalf of the respondents. In the latter part of the year 1828, the pauper Christopher Morley went to work as a piecer at Crompton & Ditchfield's cotton mill called Ringley Mill, at Outwood, within Pilkington. He was to serve the persons working at the mill as master spinners, who were Messrs. Crompton & Ditchfield: but the practice of such mills is that the piecers assist certain spinners to whom respectively they are attached. The wages paid by the master spinner are in proportion to the work done: the spinner receives the whole wages for the work

done by him with such assistance, and thereout pays the piecers without the interference of the master spinner. The obligation of the parties to remain in the same service varies at different mills. There were no \*printed  
 \*665] rules in Crompton & Ditchfield's mill to regulate such obligation; but it was understood that all persons there employed were bound to give a fortnight's notice of their intention to leave the service. Subject to this understanding, the spinner engages and dismisses his own piecers without the interference of the master spinner. Morley was thus engaged by one Eatock, a spinner, and served under him for a little more than a year; during all which time he was a bachelor, unmarried, and without child or children, and worked and slept in Pilkington. His wages were reckoned by the week, but paid every fortnight, by the hands of Eatock; and he could leave the service, by giving a fortnight's notice at the end of any week. At the end of the above period, Morley, wishing to work as a spinner in an adjoining mill belonging to Messrs. Crompton & Ditchfield, was required to give a fortnight's notice of his intention to leave. This adjoining mill was worked by one Meadowcroft, who took it of Crompton & Ditchfield, and had the sole management of it, spinning by commission for Crompton & Ditchfield at so much a hundred weight of cotton yarn spun: but the mill was under the superintendence and control of Crompton & Ditchfield. Morley immediately engaged himself with Meadowcroft, to work at this adjoining mill as a spinner, and to be paid according to the quantity of work done. Nothing was said as to how long he was to remain; but the same understanding prevailed as to notice. He served more than a year, receiving his wages every fortnight from Meadowcroft's manager: he then left, having received a fortnight's notice from Meadowcroft's manager. During this last service he was a bachelor, unmarried, and without child or children, and worked and slept at Outwood within Pilkington.

\*666] \*The respondents having closed their case, the appellants objected that no settlement appeared to have been gained by Morley. That there was not, in the case of either service, a hiring for a year, or any thing equivalent. That the first service was a service to Eatock, and therefore varied from the examination. That no settlement could be gained by the hiring and service of a piecer as above described. That the second hiring and service was with Meadowcroft, and therefore varied from the examination. No further evidence having been given by the appellants, the sessions confirmed the order, subject to the opinion of the Court of Queen's Bench, upon the several objections taken as above mentioned.

The case was argued in last term.(a)

*Cowling* in support of the order of sessions. First, the examination shows matter from which the removing justices might, if they judged fit,

(a) January 24th 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

infer a yearly hiring and service in the appellant parish ; and the grounds of appeal raise no objection to which this is not an answer. A jury might infer hiring for a year from such evidence, especially with the fact of a year's service. In *Rex v. Lyth*, 5 T. R. 327, this court said that a service for a year in husbandry afforded, without any proof of contract, "very strong presumptive evidence of a hiring for a year;" and *Rex v. Holy Trinity in Wareham*, Cald. 141, is a very strong case to the same effect. Other authorities are collected in Archb. P. L. (3 Archb. Justice of the Peace,) 338, &c., (4th ed.) If a witness simply said that he had "taken" a house, magistrates might, from the \*taking, infer a contract. [\*667 The fortnight's notice is not incompatible with a hiring for a year, and indeed supports the presumption. The wages are to be paid weekly: the notice is not a week's notice ; the hiring therefore may be assumed to be general, which, in default of explanation, is a hiring for a year. Thus a hiring at so much per week with a month's notice was held by this court to be a hiring for a year, though the sessions had negatived such hiring; *Rex v. St. Andrew, Pershore*, 8 B. & C. 679. Next, there was evidence, at the trial, of a hiring of the pauper while unmarried, at Crompton & Ditchfield's other mill, for a year, and a service for such year. It is said that the hiring and service was not under Messrs. Crompton. But a servant may be engaged by a superintendent. [COLERIDGE, J. Could the pauper have sued Messrs. Crompton for wages?] He could, if the jury inferred an authority from Messrs. Crompton to Eatock or Meadowcroft. [PATTESON, J. It is, after all, a question of fact.] On that, if there be any evidence, the court will not reverse the decision of the sessions.

*Wortley and J. Peel*, contra. First, as to the examinations. The rule which has been acted upon by this court is that the examination must disclose that by which the respondents can see that a settlement is gained. Here the examination shows no hiring positively, and only matter consistent with a hiring for a fortnight as much as for a year. At least the fact of hiring should appear directly, and with what parties it was made. The whole service might be under an apprenticeship. Or it might be to parties other than Messrs. Crompton: a floor in a mill is often let out by the \*owners. Nothing is to be left to inference; *Regina v. North Bovey*, 2 Q. B. 500, *Regina v. The Justices of the West Riding*, 2 Q. B. 505; *Regina v. Old Stratford*, 2 Q. B. 513; *Regina v. Wymondham*, 2 Q. B. 541; *Regina v. The Recorder of Leeds*, 2 Q. B. 547, (note.) [\*668 [PATTESON, J. Where the inference is to be drawn by the justices, I do not see how we can call on the pauper to draw it.] Secondly, the sessions have not found a hiring; and, therefore, even if there was evidence at the trial upon which they might do so, the court will either quash the order, or send the case back to the sessions as in *Rex v. Road*, 1 B. & Ad. 362. But here there is not such evidence. *Rex v. Sparsholt*, 4 A. & E. 491, shows that, as the pauper was not to obey the orders of Messrs. Crompton, he was not their servant. It appears from *Rex v. Hanbury*,

2 East. 423, that a hiring at weekly wages, with a week's notice, negatives a yearly hiring. An indefinite hiring, to work by the piece, is not a yearly hiring; *Rex v. St. Peter's, Dorchester*, Bur. S. C. 513. The utmost that *Rex v. Lyth*, 5 T. R. 327, proves is that the sessions here might, if they had thought fit, have found a hiring. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

We think that there is no valid objection to this examination. It may be that, when a settlement depends on a simple fact known to the pauper, he ought to state that fact in his examination; but it is very different when the settlement depends upon a fact which is itself a legal consequence of the facts known to the \*pauper. That is the case with respect to  
 \*669] a contract of hiring. A pauper may not know what constitutes such a contract, and can state no more than the facts within his knowledge. On these the justices must form their opinion. And on this examination there were facts sufficient to warrant them in inferring the contract.

The sessions also ask our opinion as to the evidence at the trial. They appear to have considered that the hiring was general, but that it was questionable to whom the hiring was. Now, if the sessions meant to find the fact on the evidence, and to ask us only whether the evidence warranted such finding, they have done properly in sending the case to us: but they have done wrong if they meant to ask us to find the fact. We must assume that what they meant was the former. And we think that the facts warrant them in their finding. *Rex v. Sparsholt*, 4 A. & E. 491, was cited as showing that this court, upon similar evidence, took upon itself to negative the hiring to the supposed master: but there the opinion of the court was in accordance with the order of sessions, which was confirmed. We cannot say that the finding of the sessions here is wrong.

Order of sessions confirmed.(a)

(a) The QUEEN v. The Inhabitants of ST. PAUL, COVENT GARDEN.

A pauper was removed to P., on her examination, in which she stated that, while unmarried, she served for several years under a general hiring in P. On appeal, the sessions confirmed the order, subject to a case, in which they stated, as their opinion, that the examination disclosed sufficient evidence of a settlement by hiring and service; adding, that the question for this court was, whether it did disclose sufficient evidence.

This court quashed the order of sessions, because the examination did not show that the pauper was unmarried at the time of the contract of hiring.

On appeal against an order of two justices, removing Sarah Bull, widow, from the parish of St. Luke, Chelsea, to the parish of St. Paul, Covent Garden, both in Middlesex,  
 \*670] the sessions confirmed the order, subject to a \*case. The case stated that the order of removal was made on the examination of the pauper; wherein she deposed that she was married in 1834; and that, "whilst unmarried, and not having a child or children, she lived at Spencer's Hotel, in Bow street, in the parish of St. Paul, Covent Garden, in the county of Middlesex, for several years, as chambermaid, under a general hiring, and quitted there a few months previous to her marriage as aforesaid." Several objections were taken; among others, that the examination did not contain any sufficient or legal evidence of a settlement in the appellant parish, and that the date of

the hiring did not appear: but the sessions "considered that the examination disclosed sufficient evidence of a settlement by hiring and service in the appellants' parish of St. Paul, Covent Garden: and, upon the evidence produced before the court, confirmed the order." The question for this court was stated to be, "whether the examination does disclose sufficient evidence of a settlement by hiring and service in the appellants' parish of St. Paul, Covent Garden."

*Deedes*, in support of the order of sessions, contended that, on the question whether the examination was sufficiently specific, the sessions were the proper judges; that the evidence brought the service down to a few months before the marriage, of which the date was given; and that the sessions had been satisfied with this: and he contended that this court would not overrule the decision of the sessions on such a point. He referred to *Regina v. Kingsclere*, (3 Q. B. 388.)

*Pashley*, contra. The examination does not state that the pauper was unmarried at the time of the contract of hiring, but only at the time of the service: she may have had a husband who died between the time of the contract and the commencement of the service. (He was then stopped by the court.)

LORD DENMAN, C. J. The settlement can be gained only by her being hired while unmarried: it does not appear that she was so at the time of her hiring: the examination is bad for this defect.

PATTERSON, COLERIDGE, and WIGHTMAN, Js., concurred.

Order of sessions quashed.

### \*ASPDIN v. AUSTIN.

[\*671

By agreement between plaintiff and defendant, plaintiff agreed to manufacture for defendant cement of a certain quality; and defendant, on condition of plaintiff's performing such engagement, promised to pay him 4*l.* weekly during the two years following the date of the agreement, and 5*l.* weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years: and plaintiff engaged to instruct defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. Defendant afterwards covenanted by deed for the performance of the agreement on his part.

*Held*, that the stipulations in the agreement did not raise an implied covenant that defendant should employ plaintiff in the business during three or two years, though defendant was bound by the express words to pay plaintiff the stipulated wages during those periods respectively, if plaintiff performed, or was ready to perform, the condition precedent on his part.

COVENANT. The declaration stated that "heretofore, to wit on the 23d day of September, A. D. 1841, by a certain agreement then made by and between" plaintiff of the one part and defendant and John Seeley of the other part, plaintiff agreed to manufacture, for the use of defendant and he said John Seeley, with the materials, machinery and implements to be provided by them, a cement in every respect equal as to durability and lightness of colour to that theretofore manufactured by the father of the said plaintiff, and to the cement used in the figure of Father Thames then placed in the exhibition yard at No. 2 Keppel Row, New Road: and defendant and the said John Seeley, on the condition of plaintiff faithfully performing the aforesaid engagement, did on their part thereby covenant and promise to pay plaintiff the weekly sum of 4*l.* during the two years following the date of the said agreement, and the weekly sum of 5*l.* during

the year next following: and they did also thereby promise to receive him into partnership with them at the expiration of three years from the execution of the said agreement, and to admit him to a third share of the trade or business of manufacturers of cement at Rotherhithe in Surrey, and to give him one third of the stock and fixtures there at the time of his so entering the \*partnership (the value of which said third share

\*672] should not exceed 666*l.*) and to allow him a salary of 100*l.* per annum as manager of the concern, over and above his share of profit as partner. And it was thereby agreed that the opinion of two competent persons, one to be chosen by each side, and an arbiter to be agreed on by the said referees, should decide, on 1st May then next ensuing, by the inspection of specimens severally prepared by plaintiff, defendant and the said John Seeley, during the month of September or October in the year first aforesaid (which specimens should have been delivered on or before the 1st day of November into the hands and custody of the intended referees, and should have been by them exposed without interval or protection to the severity of the weather from the said date to the date of arbitration,) whether plaintiff had fulfilled his contract thereinbefore specified. And plaintiff did also thereby engage to teach and instruct defendant and John Seeley in the art and mystery of manufacturing all the kinds of cement with which plaintiff was acquainted, on condition that defendant and John Seeley should not engage in such manufacture otherwise than under his management or with his consent. And it was by the said agreement also witnessed that each party thereto did severally bind himself to the faithful performance of the contract so thereinbefore contained as aforesaid, in the penalty of 1500*l.*: As by the said agreement, reference being thereunto had, &c. Averment, that plaintiff, from the time of making the said agreement until and at the time of making the indenture hereinafter next mentioned, in pursuance of the said agreement, did serve defendant and J. Seeley in the manner mentioned in the said

\*673] agreement, and did \*during that period manufacture and continue to manufacture for the use of defendant and Seeley, with the materials, &c., a cement in every respect equal, &c., according to the intent and meaning of the said agreement: and that defendant and Seeley did not on or before November 1st, 1841, or before the first day of May next after the making of the agreement, choose or appoint any competent person or referee to decide, according to the agreement, whether, &c., nor was any such person or referee ever chosen or appointed by them for that purpose; and defendant and Seeley wholly omitted and neglected to choose or appoint such referee or competent person. Further averment that plaintiff, after the making of the agreement, and until and at the time of making the indenture next mentioned, did teach and instruct defendant and Seeley in the art, &c., on the condition in the agreement mentioned.

The declaration then stated that, after the making of the said agreement, to wit on June 17th, 1842, by indenture then made between Seeley of the

first part, plaintiff of the second part, and defendant of the third part (pro-  
 fert) after reciting that defendant and Seeley had for some time carried on  
 the manufacture of artificial stone, and had purchased certain leasehold  
 premises and certain machinery, &c., for the purpose of manufacturing, and  
 had manufactured, cement; that Seeley was desirous of withdrawing from  
 the manufacture of cement, and had agreed with defendant to assign to  
 him Seeley's moiety of the said premises, machinery, &c., and that defend-  
 ant should enter into such covenant for the indemnity of Seeley as was  
 after mentioned; and further reciting that, plaintiff having, by the agree-  
 ment of September 23d, acquired an interest in the said \*manu-  
 factory for, and manufacture of, cement, he, plaintiff, had, at the [\*674  
 the request of the said Seeley, and in consideration of the covenants there-  
 inafter contained on the part of defendant, agreed to be a party to, and  
 executed, the said indenture for the purpose of releasing and exonerating  
 Seeley from all claims and demands of plaintiff upon Seeley for or in re-  
 spect thereof; it was witnessed that, in pursuance of the said agreement,  
 &c., Seeley, with the consent of plaintiff, testified by his executing the in-  
 denture, had bargained, sold, assigned, &c. (assignment by Seeley of his  
 moiety above mentioned to defendant: and it was further witnessed that,  
 in further pursuance of the said agreement and in consideration of the pre-  
 mises, defendant did thereby, for himself, his heirs, executors and admin-  
 istrators, covenant, promise and agree to and with Seeley, his executors  
 and administrators, and also, as a separate covenant, with plaintiff, his  
 executors and administrators, that he, defendant, would faithfully and truly  
 observe, perform and fulfil the several stipulations and agreements in the  
 said agreement of the 23d day of September then last entered into and  
 made with the plaintiff: and it was further witnessed, &c. (release to See-  
 ley by plaintiff of all actions, causes of action, claims, &c., under or by  
 virtue of the said agreement.) Provided always, and it was thereby agreed  
 between defendant and plaintiff, that nothing therein contained should pre-  
 vent defendant from taking another partner in the place and stead of See-  
 ley, on condition that the said new partner should take upon himself the  
 stipulations and agreements contained in the above mentioned agreement,  
 or such of them as defendant and Seeley or either of them might on the day  
 of the date of the now reciting indenture be liable or compellable to per-  
 form. And it was provided \*that nothing thereinbefore contained  
 should be construed, &c., to be an acknowledgment or admission [\*675  
 by defendant that plaintiff had in all things well and faithfully observed  
 and performed all the stipulations and agreements mentioned and contained  
 in the said memorandum of agreement, nor an acknowledgment or ad-  
 mission by plaintiff that the same had not been so observed and performed:  
 As by the said indenture, &c.

The declaration then averred that plaintiff, from the time of making the  
 said indenture until he was discharged by defendant as after mentioned,  
 did, in pursuance of the said agreement and indenture, serve defendant in

the manner therein mentioned, and did during that period manufacture, &c., and did during the period last aforesaid teach and instruct defendant, &c.: (averments of performance as to defendant, as before, but omitting to mention Seeley;) according to the true intent and meaning of the said agreement and indenture.

And, although the plaintiff hath always been ready and willing, and offered to defendant, to wit on, &c., to continue to serve defendant according to the said agreement and indenture, and to manufacture for his use, as therein mentioned, the cement therein mentioned, and to continue to teach and instruct defendant according to the true intent of the said agreement and indenture, of which premises defendant hath always had notice; nevertheless plaintiff in fact says that defendant, disregarding the said covenant so made, &c., after the making of the said indenture, and before the expiration of two years following the date of the said agreement first above mentioned, to wit on 5th September, A. D. 1842, wrongfully discharged plaintiff from the service of defendant under the said agreement \*676] and indenture, and \*from manufacturing, or continuing any longer to manufacture, cement for the use of defendant according to the said agreement and indenture, and from any longer teaching and instructing defendant in the art and mystery mentioned in the said agreement in that behalf, and from any further performance of the said agreement whatsoever, and hath from thence hitherto refused and still doth refuse to permit or suffer plaintiff to continue in the service of defendant as aforesaid, or to manufacture cement for the use of defendant according to the said agreement and indenture, or to teach and instruct defendant in manner aforesaid. Whereby plaintiff hath lost all the profits and advantages he would have derived from the performance of the said agreement and indenture by defendant. Neither hath defendant paid plaintiff the said sum of 1500*l.* in the said agreement mentioned, or any part thereof, but the same remains wholly due, &c., contrary to the true intent, &c., of the said agreement and indenture. And so plaintiff saith that defendant, although often requested, hath not kept the said covenant, &c. To the damage of plaintiff of 1500*l.*, &c.

Pleas. 2. That plaintiff did not serve defendant in the manner in the said agreement mentioned, in manner and form, &c. Conclusion to the country.

5. That plaintiff did not teach or instruct defendant in the art and mystery of manufacturing all the kinds of cement with which plaintiff was acquainted, in manner and form, &c. Conclusion to the country.

Demurrers. To plea 2; assigning for causes (among others) that the plea traverses an immaterial averment only; that the traverse is too vague and general; that the traverse is too large, and puts in issue both the \*677] \*manufacturing of the cement according to agreement, and the teaching, whereas the teaching is not a condition precedent to the right of action; also that the traverse is too large and uncertain, as putting the plaintiff to prove that he served defendant as in the agreement mentioned without in any point or at any time deviating from his duty in

such service, or failing therein, whereas it is not every deviation or failure that would entitle defendant to discharge plaintiff, &c. To plea 5, among other causes: that the plea traverses an immaterial averment only, for that, if plaintiff did not teach, &c., it would be ground only for a cross action, and would not justify the breach of covenant. That, consistently with the plea, plaintiff may have taught defendant the art of manufacturing all the kinds of cement with which he was acquainted but one, and the omission to teach that one would not justify the breach. That the teaching is not a condition precedent, &c. That the traverse is too vague and general, &c.; and that the plea ought to have shown that plaintiff omitted to teach the making of some particular kind of cement; or should have denied that plaintiff taught defendant the making of any with which plaintiff was acquainted. Joinder.

The demurrers were argued in the last term.(a)

*Peacock*, for the plaintiff, contended that the pleas were bad on the grounds above stated. (The court having given no judgment on this part of the case, the argument upon it is not reported.) It will be objected to the declaration, that the agreement and indenture there stated contain no covenant by the defendant to \*keep the plaintiff in his service for any definite time, but only to pay him at certain weekly rates while in the service, and therefore that the action is wrongly brought. But the agreement, incorporated in the indenture by reference, was that plaintiff should manufacture cement of a certain quality for defendant, and that, on condition of plaintiff's fulfilling his engagement, defendant should pay him 4*l.* a week for two years next after the date of the agreement, and 5*l.* a week during the year following, and should receive him into partnership at the end of three years from the date of the agreement. From the whole context it is clear that an engagement for at least three years was contemplated. Some authorities on the subject were lately before the court in the argument in *Dunn v. Sayles*, post, p. 685, now standing for judgment. In 6 Vin. Abr. 377, &c., tit. *Covenant* (C,) many instances are collected, proving that a covenant arises without express words, where the language of a deed clearly shows an agreement intended. In Com. Dig., *Covenant*, (A 2,) it is stated that, "any words in a deed, which show an agreement to do a thing, make a covenant: as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo proinde the interest to A.; covenant lies against B. for the interest." If the defendant had covenanted with the plaintiff to pay him 1000*l.*, plaintiff covenanting to build a house on defendant's land, clearly that would have been a covenant by defendant to allow plaintiff so to build. Further, it will be contended that, by the agreement, arbitrators nominated on each side were to ascertain within a given time, by inspection of specimens, whether the plaintiff \*had fulfilled his contract as to the quality of the manufacture; that the

(a) January 23d. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

rest of the agreement depended on this, and that arbitrators do not appear to have been called in. But this is no answer. (The further argument on this point is omitted, no decision having been given upon it.)<sup>(a)</sup>

*Udall*, contra. If the plaintiff is entitled to recover at all, he has mistaken his remedy, by suing, not for the weekly wages which he might have been earning if still employed, but for the penal sum of 1500*l.* No breach of the contract appears; for the declaration does not aver, so as to make it material, any time from which the employment was to begin. [Lord DENMAN, C. J. The promise stated is to pay wages at 4*l.* for "two years following the date of the said agreement," and at 5*l.* for "the year next following."] But the day from which the two years are to commence (September 23d, 1841,) is laid under a *videlicet*; therefore no certain day appears; *Dakin's Case*, 2 Saund. 290; *Parkinson v. Whitehead*, 2 Man. & G. 329. [COLERIDGE, J. The contract is to pay 4*l.* weekly "during the two years following the date of the said agreement;" it is immaterial when the date was. PATTESON, J. The time would begin to run from the execution of the agreement, whenever that might be.] The court will not presume such a date as is requisite to support the action; *Anderson v. Thornton*, 3 Q. B. 271. The agreement may even have been executed since the writ was issued in this action. Further, the agreement, as pleaded, does \*not show any contract by the defendant  
 \*680] to retain or by the plaintiff to serve. [PATTESON, J. It may be said on the other side that, when the indenture was made, all this was immaterial.] It does not appear with certainty when the indenture was made. If implied contracts to employ and to serve resulted from the agreement and indenture, they should have been alleged in the declaration. The passages cited from tit. *Covenant* in Viner's Abridgment and Comyns's Digest decide nothing here, because, if the alleged covenant can be collected from the words used, the question still remains, whether the breach complained of is that which should have been alleged on the particular agreement.

*Peacock*, in reply. The declaration states that heretofore, "to wit on the 23d day of September, A. D. 1841," by an agreement "then made," &c., the parties contracted, and the defendant agreed to pay the plaintiff 4*l.* weekly during the two years following the date of such agreement. This fixes the time with sufficient certainty. (*Peacock* here cited *Nightingale v. Wilcoxon*, 10 B. & C. 202; *Ring v. Roxbrough*, 2 Cro. & J. 418; S. C., 2 Tyr. 468; *Down v. Hatcher*, 10 A. & E. 121; *Dakin's Case*, 2 Saund. 290; <sup>(b)</sup> *Owen v. Waters*, 2 M. & W. 91; *Hague v. French*, 3 B. & P. 173, and *Coxon v. Lyon*:<sup>(c)</sup> and he also relied upon that part

(a) *Peacock* cited *Otway v. Holdipe*, (2 Mod. 266,) and *Thompson v. Charnock*, (8 T. R. 139.) *Udall*, contra, referred to *Lancashire v. Kellingworth*, (Comyns's Rep. 116; 8. C., 12 Mod. 529,) and *Coombe v. Greene*, (11 M. & W. 480.)

(b) See the notes to that case in 2 Wms. Saund. 290 c.—291 c, 6th ed.

(c) Note to *Jones v. Mares*, 2 Campb. 207.

of the declaration which stated that, "after the making of the said agreement, to wit on June 17th, 1842, by indenture then made," &c., defendant covenanted to fulfil the said agreement "of the 23d day of September then last:" but this part of the argument need not be further detailed, \*the decision of the court not having turned upon it.) As to the objection that no covenant to employ appears by the declaration: [\*681 if the stipulations of the deed clearly evince the intention that this should be done, *Sampson v. Easterby*, 9 B & C. 505,(a) and *Saltoun v. Houstoun*, 1 Bing. 433, are direct authorities to show that a covenant in law arises to perform it, and is well declared upon by setting out the deed in its own terms. In *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487, the lessee of lands containing limestone covenanted with the lessor to furnish him with lime for the improvement of his land at a certain rate, at all times and seasons of burning lime: and this, on a view of the whole context, was held to raise a covenant that the lessee would burn lime at those seasons. *The Duke of St. Albans v. Ellis*, 16 East, 352, was decided on similar principles. The objection here that the plaintiff is proceeding for the penalty turns upon words which may be rejected as surplusage.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action of covenant for the performance of the stipulations contained in a prior agreement not under seal: and the breach complained of is the wrongful discharge of the plaintiff from service under the agreement, and from manufacturing cement for the defendant as well as from teaching the defendant the art of manufacturing cements. The defendant, in his second plea, pleads that the plaintiff did not serve him in manner \*as in the said agreement mentioned, in manner and form as the plaintiff has alleged in his declaration. In the fifth plea [\*682 he alleges that the plaintiff did not instruct him in the art of manufacturing all cements with which he was acquainted, in manner and form, &c. To which pleas the plaintiff demurs: and the defendant in return objects to the declaration, principally that the breach is badly assigned, for that there is no contract on the defendant's part to retain the plaintiff in his service nor any on the plaintiff's part to remain in it.

The stipulations between the parties, as set out in the declaration, appear to be these. The plaintiff agrees to manufacture for the defendant, with the materials and machinery to be provided by him, a cement of certain quality; and, on condition of his doing so, defendant agrees to pay him weekly 4*l.* for two years, and 5*l.* weekly for the following year, and then to receive him as partner: the plaintiff also further agrees to teach the defendant how to manufacture all the kinds of cement with which he himself is acquainted. Upon the face of this agreement, it is certainly true that in terms there is no stipulation for retaining the plaintiff in the defendant's service: but it is alleged for the plaintiff that,

(a) Affirmed in Exch. Ch., *Easterby v. Sampson*, 6 Bing. 644.

in substance, it is a contract of hiring and service of a special kind, and that an agreement to retain during three years is necessarily to be implied from the express stipulation for weekly wages during that period. The defendant has agreed that, if the plaintiff will manufacture the cement for him with his materials and machinery, he will pay him for so doing weekly sums during three years next following: these sums, it is said, must certainly be understood to be wages for service done; but, unless the defendant continue the plaintiff in his service, and so give him an opportunity of earning the wages, \*the express agreement of the parties cannot be performed on either side. Further it is argued that the stipulation for a partnership at the end of three years shows that it was contemplated that both the business of cement making and the service should be continued during that time, because without it the defendant could not really and substantially admit the plaintiff to the partnership contemplated, which was to be, not in a business intermitted till that time and then recommenced, but in one which had been uninterruptedly continued, and in which the plaintiff himself had borne a part and acquired an interest and connection by service during the whole period. It cannot be denied that there is force in this argument; and in support of it were cited the cases of *Sampson v. Easterby*, 9 B. & C. 505,(a) and *Saltoun v. Houstoun*, 1 Bing. 433.

We have examined these and several earlier cases which were cited in the argument in the latter case: and, upon consideration, they do not appear to us to support the proposition for which the plaintiff contends to the extent to which it is necessary for him to carry it. It will be found in those cases that, where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them. But it is a manifest extension of that principle to hold that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such cove-

(a) Affirmed in Exch. Ch., *Easterby v. Sampson*, 6 Bing. 644.

nants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application. The breach here assigned by the plaintiff assumes that the defendant, at however great loss to himself, was bound to continue his business for three years: but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what on his part he has made a condition precedent; and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready and willing, and offers, to perform it, and is prevented only by the defendant from doing it. This, then, is the safe \*rule for determining the rights of these parties between each other, and no injustice follows to the plaintiff. If he should assign a breach in the non-payment of the weekly sums, it would be no answer for the defendant to say that he had discontinued the business and dismissed the plaintiff: the reply would be that he might, indeed, if he pleased, do both, but that he was still bound to make the payment which he had expressly covenanted to make. [\*685]

We are of opinion, therefore, that the breach is not well assigned: and, of course, without examining into the pleas, our judgment must be for the defendant.

Judgment for defendant.(a)

(a) See the next case.

### JOHN DUNN, the elder, v. SAYLES.

Declaration in covenant stated that by deed between defendant, D. and plaintiff, plaintiff covenanted that D. should for five years from the date serve defendant in the art of a surgeon dentist, and attend for nine hours each day; and defendant, in consideration of the services to be done by D., covenanted with plaintiff that he, defendant, would during that five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise) pay D. 35s. per week for the first year, 2l. per week for the second and third, and 2l. 2s. per week for the fourth and fifth: that D. was in the service for some time after the making of the deed, till dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c., to the end of the five years: but defendant, during the term, refused to permit D. to remain in his service, and dismissed him. *Held*, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach.

**COVENANT.** The declaration charged that, by deed made heretofore, to wit 13th April, 1842, between defendant of the first part, John Dunn the younger, son of plaintiff, of the second part, and plaintiff of the third part, (profert,) the date whereof is, &c., to wit the day and year aforesaid, plaintiff, for the considerations thereafter particularly mentioned, did thereby, for himself, his executors and administrators, \*covenant and agree to and with defendant, his executors, administrators and [\*686]

assigns, viz. that the said John Dunn the younger should and would, for and during the term of five years from the day of the date of the said deed, serve, abide and continue with defendant, his executors, &c., as his and their assistant, in the art and mystery of surgeon dentist, and diligently and faithfully exercise and employ himself in, and do, execute and perform, all such service, work and labour, relative to the said art and mystery, as defendant, his executors, &c., should from time to time order, direct, &c., in the way of his said art, &c., during the said term; and also that J. D. the younger should and would endeavour, by all due care and diligence, to promote the interest of defendant, his executors, &c., and would faithfully and truly serve him without embezzling, losing, &c., any of the money, goods, &c., of defendant, his executors, &c.: and, during the absence of defendant, should well and faithfully assist in the management of the said art, &c.: and also that he should not take in, do or perform, either on his own account, or for any other person or persons save defendant, any business relating to the said art, &c., without leave and consent of defendant, his executors, &c.: and that he should faithfully and diligently attend the work of defendant for nine hours each day, and should not absent himself from the service of defendant without his leave, &c., save through sickness or unforeseen accident: and defendant, for and in consideration of the services to be done and performed by and on the part of J. D. the younger as aforesaid, did, by the said deed, for himself, his heirs, executors, &c., “covenant, promise and agree with the said John Dunn the elder, his executors and administrators, that defendant, his executors,” &c., “should and would, during the said term of

\*687] five years (in case the said J. D. the younger should well and truly do and perform his part of that agreement, and particularly the work and labour of nine hours per day as thereinbefore stipulated, but not otherwise,) “well and truly pay or cause to be paid unto J. D. the younger the several weekly sums of money thereafter mentioned, that is to say, 35s. weekly and every week during the first year of the said term, 2l. weekly and every week during the second and third years of the said term, and 2l. 2s. weekly and every week during the fourth and fifth years of the said term, for wages and compensation for the services aforesaid,” as by the said deed, reference, &c. That J. D. the younger, before and at the time when the deed was made, was in the service of defendant as an assistant in his said art, &c.: and that, after the making of the deed, to wit 13th April, 1842, J. D. the younger, under and subject to the deed and upon the terms thereof, was in the service of defendant as such assistant as aforesaid, and commenced his service as such assistant, under and subject to the deed and upon the terms thereof, for the term of five years in the deed mentioned: and that he remained and continued in the said service, &c., from the time of making the deed until he was dismissed and discharged as after mentioned, to wit until a certain day after the making of the deed, during the said term, and before the commencement of this

suit, to wit 5th October, 1842; and that J. D. the younger, during all that time, according to the said deed in that behalf, did serve, abide, &c., and diligently and faithfully exercise, &c., and execute and perform, &c., as defendant from time to time ordered, &c., in the way of his said art, &c.; and did endeavour, &c., to promote the interest of defendant; and faithfully \*and truly served him without embezzling, &c.; and also, during the absence of defendant, well and faithfully assisted, [\*688 &c.; and did not take in or do, or perform, either on his own account, &c., any business relating, &c., without leave, &c.; and also did faithfully and diligently attend to all such work of defendant, for nine hours each day, as it was the business and duty of the said J. D. the younger to attend to, according to the said deed in that behalf; and did not absent himself, &c.: and also that the said J. D. the younger, after the making the said deed, whilst he was in the service of defendant as aforesaid, and until he was dismissed and discharged as aforesaid, well and truly did and performed his part of the said agreement, and particularly all such work and labour for nine hours, &c., as in the deed stipulated, &c.: that plaintiff and J. D. the younger have, and each of them hath, always from the time of making the deed until J. D. the younger was dismissed and discharged as aforesaid, well and truly observed, &c., on their parts, according to the tenor and effect, &c., of the deed. And, although the said J. D. the younger was, to wit on the day and year last aforesaid, ready and willing, and then tendered and offered, to continue so to do, and in all things to observe and perform his part of the said agreement, and also the said deed, on his part, until the end of the said term of five years in the said deed mentioned, (of which premises defendant then had notice,) yet defendant, after the making of the said deed, “during the said term of five years, and before the commencement of this suit, to wit on,” &c., “wholly refused to suffer or permit the said J. D. the younger any longer to remain or continue in his, the defendant’s, service, or to serve him as such assistant as aforesaid, according to the said \*deed in that behalf, or any longer to observe, perform or fulfil the said deed as [\*689 such assistant as aforesaid, or to do or perform his part of the said agreement; and then, after the making of the said deed, during the said term of five years, and before the commencement of this suit, to wit on,” &c., “dismissed and discharged the said J. D. the younger from and out of the service and employ of the defendant under and subject to the said deed; and hath, from thence until the commencement of this suit, being divers to wit three weeks, wholly refused to suffer or permit the said J. D. the younger to be in the service or employment of the defendant, or to serve him, or do or perform his duty as such assistant as aforesaid, according to the said deed in that behalf:” by means whereof, for and during all that time, &c., J. D. the younger hath been prevented from earning, &c., and hath not obtained, &c., and defendant hath not paid, &c., any weekly sum or sums, &c., “contrary to the said deed, and to the said covenant

of the defendant by him in that behalf made as aforesaid." Other breaches were added.

The defendant pleaded ten pleas, all leading to issues of fact: but there was no plea of non est factum.

On the trial, before PATTESON, J, at the Middlesex sittings in Michaelmas term, 1843, a verdict was found for the plaintiff; and damages were assessed severally on the different breaches. In the same term, *Manning*, Serjt., obtained a rule nisi for arresting judgment on the first breach. In last term(a)

*Platt* and *Peacock* showed cause. The objection is that the deed set out in the declaration shows no covenant to retain the son in the defendant's service. Such \*a covenant is not indeed expressly inserted ;  
 \*690] but it will be implied. The plaintiff covenants that the son shall serve ; but this cannot be performed unless the defendant permits the service : it was therefore clearly understood between the parties that the defendant should permit the service. The defendant, in consideration of the service to be done by the son, covenants to make him weekly payments in case he truly performs the agreement : that is quite inconsistent with the supposition that the defendant is to be at liberty to reject the service. The wages are to be paid for the five years, at higher rates as the time goes on : it cannot have been meant that, after the son had served for the lower wages agreed upon for the first part of the time, he was to be debarred from earning the higher wages, with a view to which he had entered into the contract. If it be agreed, under seal, between parties that one shall pay the other money for his land, that is a covenant by the other to sell the land ; *Pordage v. Cole*, 1 Saund. 319. [COLERIDGE, J. Ought you not expressly to allege, in your declaration, the covenant on which you rely, though you prove it only by the production of the deed in which you say it is implied?] The effect of the deed is set out in the declaration : if the deed raises the covenant, as a legal conclusion, then the declaration does show such covenant. The word "demise" implies a covenant for title ;(b) but it is enough to allege a deed which professes to demise, for the purpose of recovering on a breach of such implied covenant. [PATTESON, J. It is true that in *Sampson v. Easterby*, 9 B. & C.  
 \*691] 505,(c) where the \*plaintiff recovered for breach of an implied covenant, the implied covenant was not set out in the declaration.] So, if a declaration in tort show facts raising a duty, the plaintiff may recover for breach of such duty, though he even allege a duty different from that which really arises ; *The Lancaster Canal Company v. Parnaby*, 11 A. & E. 230, 242.(d) So it would be enough to allege that a

(a) January 15th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

(b) See 2 Bac. Abr. 342, (7th ed.,) tit. *Covenant* (B.)

(c) Affirmed in Exch. Ch., *Easterby v. Sampson*, 6 Bing. 644.

(d) In Exch. Ch., affirming the judgment of Q. B. in *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223.

defendant was a carrier, and had been guilty of negligence. The defendant covenants here to pay wages weekly: could he discharge the plaintiff's son after five days' service? On evidence of a verbal contract to pay weekly wages, a jury would be directed to infer a contract to permit a week's service. [PATTESON, J. That would be so, if there was actual work done: would it be so, if the contract were merely to pay so much a week for as long as the other party served; and nothing more appeared?] If a servant so hired were dismissed in the middle of the week, he could not sue for work and labour, but only for breach of the agreement: *Hulle v. Heightman*, 2 East, 145. If the father here had been sued for the son's neglect to work, he might have shown that the defendant had prevented the working; which proves that the covenants are mutual.

*Manning*, Serjt., and *John Henderson*, contra. The court will not hold that A. cannot covenant to serve B. without B's. covenanting to let A. serve him. Here no more appears than such a covenant by A.; except that the defendant covenants to pay the plaintiff's son if he does serve. The defendant may well have chosen to retain in his hands the power of dismissal; whether the dismissal here was for reasonable cause might have been discussed if the son had declared, as perhaps he might, for unreasonable dismissal, instead of suing in covenant. *Pordage v. Cole*, 1 Saund. 319, was not a direct decision on the point: and there the words are "it was agreed between the plaintiff and defendant:" and the court held that this language made the deed "the words of both parties by way of agreement." Here the covenants on each side are distinct: and the payment is covenanted for, only if the son perform his covenant, "but not otherwise." The term of five years is named to limit the defendant's responsibility. Further, the covenant on which the plaintiff relies should be set out: if the declaration had alleged the covenant on which the plaintiff insists, the defendant would have pleaded *non est factum*, and must have succeeded. The word "demise" has always been considered a technical word raising a covenant by the party demising.

*Cur. adv. cult.*

LORD DENMAN, C. J., now (immediately after pronouncing judgment in *Aspdin v. Austin*, ante. p. 671, delivered the judgment of the court in this case. Having read the declaration and judgment, his lordship proceeded as follows.

After verdict for the plaintiff, the defendant has moved in arrest of judgment, that the covenant as above stated does not amount to a covenant by the defendant to retain the plaintiff's son in his employment. And we are of opinion that he is right. We have already stated our view of the law as to implied covenants in the case of *Aspdin v. Austin*, ante, p. 671, and the reasons there given apply to the present case. The judgment must be arrested, as to the first branch of covenant.

Rule absolute.

\*693] \*Lord GEORGE FREDERICK CAVENDISH BENTINCK, v.  
CONNOP.

In all cases of games within stat. 16 C. 2, c. 7, s. 2, where the stake exceeded 100*l.* and was not paid down immediately, any contract for the payment was void by sect. 3.

Therefore, where a declaration in assumpsit stated that a race called the *Grand Duke, Michael Stakes*, was annually run at the first October meeting, at Newmarket, between horses named by persons subscribing to the stakes on certain terms; that terms were declared for a race to be so run in 1842, for stakes of 50*l.* for each horse named, to be subscribed to the said stakes by the namers of such horses respectively; that plaintiff, defendant and others subscribed, and respectively named horses, defendant naming three; that the several parties mutually promised to observe the terms; that a horse named by plaintiff won the race; and that defendant thereby became liable to pay three sums of 50*l.* as and for the stakes in respect of his horses, which sums, when paid, belonged to plaintiff as winner of the stakes; yet defendant disregarded his promise, &c.

*Held* that the declaration was bad on general demurrer, as showing an illegal contract.

ASSUMPSIT. The declaration stated that, before and at the several times in this declaration after mentioned, a meeting for the purpose of horse-racing, and known by the name of First October Meeting, was commonly held at Newmarket, in the county of Cambridge; at which said meeting, during all the time aforesaid, a certain race, known by the name of the Grand Duke Michael Stakes, was annually run between horses and fillies named for that purpose by persons becoming subscribers to the said stakes upon certain terms proposed and declared in that behalf, and over a certain course there known by the name of "Across the Flat." And that, before the making of the promise of defendant in this count after mentioned, to wit on 19th November, A.D. 1840, it was proposed and declared that, for the year 1842, the said race, to wit the Grand Duke Michael Stakes, should be upon the terms following, that is to say, that the said race should be run at Newmarket aforesaid on the Tuesday, in the First October Meeting, of that year, between colts and fillies, named for that purpose on or before the 1st day of January, A.D. 1841, for stakes of 50*l.* each colt or filly so named, to be subscribed to the said

\*694] stakes by the \*namers of such colts and fillies respectively, the said colts and fillies, at the time of the said race being run, to be respectively three years old, and each such colt to carry 8 stone 7*lb.*, and each filly to carry 8 stone 3*lb.*, while running the said race. And that afterwards, and before the said 1st January, 1841, to wit, on the 31st December, 1840, the plaintiff, the defendant and divers other persons, having notice of the premises, became subscribers to the said stakes for the said year 1842, and the plaintiff then named four colts and one filly to run in the said race in the said year 1842, and the defendant, having like notice of the premises, then named two colts and one filly to run in the same race, and divers other persons then named other colts and fillies to run in the same race; and which said colts and fillies, so respectively named by

plaintiff and defendant and the said other persons, would, at the time so as aforesaid fixed for the said race being run, be three years old. And thereupon afterwards to wit on the said 31st December, 1840, in consideration of the premises, and that plaintiff and the said other persons at the request of defendant then respectively promised defendant that plaintiff and the said other persons would respectively observe and perform all things which according to the said terms were on their respective parts and behalves to be observed and performed, defendant then promised plaintiff that he, defendant, would observe and perform all things which according to the said terms were on his the defendant's part and behalf to be observed and performed. Averment that, on the Tuesday in the said meeting called and known as the First October Meeting of the said year, 1842, to wit on the 27th September, in that year, the said race was run at Newmarket, aforesaid, over \*the said course there, and that one of the said colts so as aforesaid named by plaintiff then ran in the said race, carrying the weight which was required for colts as aforesaid, and then won the said race; of which defendant then had notice; and defendant thereby became liable to pay three sums of 50*l.* as and for the stakes payable in respect of the colts and filly so named by defendant as aforesaid, and which said sums when paid belonged to plaintiff as such winner of the said stakes as aforesaid. Yet defendant has disregarded his promise, and, although often requested so to do, has not paid the said three sums of 50*l.*, or any or either of them or any part thereof. The second count was on an account stated. [\*695]

Pleas to the first count. 4. That the promises were an agreement not to be performed within a year, and there was no memorandum in writing, &c. Verification. 5. That true it is that the defendant did, to wit at the time and in manner and in form, &c., play at a certain game or pastime, to wit at the game or pastime of horseracing, for, and lose at such play, the said three sums of 50*l.*: and defendant further says that the said sums so played for, &c., exceeded the sum of 100*l.*, and amounted to a much larger sum, to wit 150*l.*, and were and every part thereof was lost at one time and not at different times, and upon credit, and that defendant did not pay down the same sums or any part thereof at the time when he lost the same as aforesaid: and so defendant says that, by means of the premises, and according to the force, &c., of the statute in such case, &c., he the defendant was not at any time afterwards bound or compellable to pay or make good the said three sums of 50*l.*, or any or either of them, or any part thereof, and \*the said promise of defendant was and is void. Verification. 6. That no colt, filly or other cattle of defendant ran in the said race; and that defendant's promise in the first count mentioned was and is a wager and bet for a sum exceeding 10*l.*, to wit 150*l.*; and that the wager and bet were lost at one time, to wit on, &c., contrary to the form of the statute, &c. Verification. [\*696]

Demurrer to plea 4, on the ground that it amounts to the general issue

should have concluded to the country, is argumentative, and merely denies matters of evidence, instead of stating and relying on the legal reference and effect of the matters alleged. General demurrer to pleas 5 and 6. Joinder.

The plaintiff stated in the margin, as an objection to pleas 5 and 6, that the contract stated in the declaration is legalized by stat. 18 G. 2, c. 34, s. 11; and that a contract as to the stakes for a horserace is not illegal within stat. 16 Car. 2, c. 7, or 9 Ann. c. 14.

The demurrer was argued in Michaelmas term, 1843<sup>(a)</sup> by *Kelly* for the plaintiff, and *Erle* for the defendant. The defendant's counsel argued that the declaration was bad, because the contract disclosed by it was illegal under the statute of Charles II. Besides the authorities cited in the judgment, *Bidmead v. Gale*, 4 Burr. 2432; *Edgebury v. Rosindale*, 2 Lev. 94, and stats. 13 G. 2, c. 19, and 3 & 4 Vict. c. 5, were referred to in this part of the argument.

Another objection was taken for the defendant, and argued, which was  
 \*697] stated in the defendant's points for argument as follows. "The consideration (a mutual promise) is stated as moving from the plaintiff and other persons, and the promise founded thereon as made to the plaintiff alone. The consideration fails *ex facie* as to part; for it does not appear that the promise of the other persons was binding on them, or that there was any consideration for it. Nor does it appear to whom the stakes were to be paid." *King v. Sears*, 2 Cro., M. & R. 48; S. C., 5 Tyrwh. 587; *Nurse v. Wills*, 4 B. & Ad. 739,<sup>(b)</sup> and Com. Dig., *Action upon the case upon Assumpsit*, (B 13,) were cited. The court gave no decision on this point: and the judgment delivered makes a further report unnecessary as to any other part of the argument.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This was a demurrer to several pleas to a declaration in assumpsit: and upon the argument several points were made and discussed as to the validity of the pleas, to which we do not think it necessary now to advert, as we are of opinion that the declaration is insufficient.

The declaration states an agreement that the Grand Duke Michael Stakes should be run for by horses named by persons becoming subscribers to those stakes, and that the race should be run for stakes of 50*l.* each colt or filly so named, to be subscribed to the said stakes by the namers of such colts and fillies respectively, and the plaintiff the defendant and divers other persons became subscribers to the said stakes; that  
 \*698] the plaintiff named four colts and one filly, and the defendant named two colts and one filly, and divers other persons named other colts and fillies: and thereupon in consideration of the premises,

(a) November 17th. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, Js.

(b) Judgment affirmed on error in Exch. Ch., *Wills v. Nurse*, 1 A. & E. 65.

and that the plaintiff *and the said other persons* at the request of the defendant then promised the defendant respectively that he the plaintiff and the said other persons would respectively on their parts observe the said terms, *the defendant promised the plaintiff* that he would perform all things required on his part by the said terms; that the race was duly run, and that one of the colts named by the plaintiff won: whereupon the defendant became liable to pay to the plaintiff three sums of 50*l.* each in respect of the colts and filly named by him. It appears, therefore, that a horse-race was to be run for stakes of 50*l.* for each colt or filly, to be subscribed by the persons naming such colt or filly, and that the defendant named three, and became liable to pay to the plaintiff, whose horse won the race, the three sums of 50*l.* It was scarcely contended, on the part of the defendant, that the race itself, being for a stake of more than 50*l.*, was not legal; but it was said that notwithstanding the race was legal, no action would lie against the defendant to compel him to pay his share of the stakes, for that, by the third section of stat. 16 Car. 2, c. 7, *no action will lie to recover a stake of greater amount than 100*l.*, though, had it been paid down, the transaction would have been legal.*

The words of the statute are "If any person or persons shall" "play at any of the said games," (horseracing being one) "*(other than with and for ready money)* or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum <sup>\*</sup>of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay [<sup>\*699</sup> down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said moneys, or other thing or things so played or to be played for, above the said sum of 100*l.*, shall not in that case be bound or compelled or compellable to pay or make good the same; but the contract," and *any promise for the same shall be void.* The object of the statute was to prevent persons playing for more than 100*l.*, at any of the enumerated games, except for ready money. And in the present case the stake of the defendant was 150*l.*, upon a single event, the winning the Grand Duke Michael Stakes: and, the defendant not having paid down the amount, the plaintiff has brought the present action to recover the money which he has won. The plaintiff, in support of the general proposition that an action might be maintained to recover the stakes won at a legal horserace, cited the two late cases of *Evans v. Pratt*, 3 Man. & G. 759; S. C., 1 Dowl. N. S. 505, in the Common Pleas, and *Challand v. Dray*, Bail Court, 1 Dowl. N. S. 783, in this court, both of which are reported in the first volume of Dowling's Cases, n. s. Neither of these cases, however, apply to the question now under consideration; as, in each of them, the sum won and sought to be recovered by action did not exceed 100*l.*: and the only answer given at the bar to the objection that the case was within the third section of stat. 16 C. 2, c. 7, was that, as there was no contract for credit, the statute did not apply.

But it appears to us that the words of the statute cannot be limited to cases of express contracts for credit, \*but that they apply to all cases where the stake amounts to more than 100*l.* and is not paid down immediately; and that, if it be necessary to enforce the payment (except from a stakeholder to whom it has been paid down, the case is within the words and certainly within the spirit of the act, the object of which was to restrain gaming by obliging the parties to play for ready money if the stakes exceeded 100*l.* The case of *Shillito v. Theed*, 7 Bing. 405, is a direct authority that the operation of the third section of stat. 16 C. 2, c. 7, is not affected by the race being legal under stat. 18 G. 2, c. 34, or any other statute respecting horseracing: and the case of *Applegarth v. Colley*, 10 M. & W. 723, is to the same effect.

We are, therefore, of opinion that, without reference to the pleas, and considering the question upon the declaration only, there should be judgment for the defendant.

There were some other objections raised to the declaration, the validity of which we do not think it necessary to consider, being of opinion that the principal objection is decisive. Judgment for defendant.(a)

(a) See stat. 8 & 9 Vict. c. 109, ss. 15 and 18.

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\*701] \*WILLIAM HILTON v. The Right Honourable GRANVILLE, Earl GRANVILLE.

To a declaration in case for digging mines near the foundations of plaintiff's dwelling house, without leaving due support, so that the said foundations were injured, and the dwelling-house cracked, sank in and was in danger of falling and being destroyed, defendant pleaded,

That the dwelling-house, from time whereof, &c., was part of the manor of N., and was situate in a township within the said manor; that the queen was seised in fee of the manor, and of the mines, collieries and seams of coal therein; and that she and all those whose estate she had, &c., and their tenants and those to whom she or they have granted license to mine, from time whereof, &c., have been used, &c., and of right ought, &c., to work the said mines, collieries, &c., under any messuages, dwelling-houses, buildings and lands, parcel of the manor and within the township, and, for the purpose of working the said mines, collieries, &c., to dig and make under ground all such mines, pits, &c., under the said messuages, dwelling-houses, buildings and lands, or any part thereof, as might from time to time be expedient and necessary for that purpose, and out of the said mines, &c., to get the coals, &c., and carry away and convert the same, doing no more than necessary for the purpose aforesaid, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation, when demanded, for the use of the surface, or any damage occasioned thereunto in and about the working of the mines, collieries, &c., but without making compensation in respect of the surface on any other account, and without making compensation for any damage occasioned to any messuages, dwelling-houses or other buildings within and part or parcel of the manor by or for the purpose of working the said mines, collieries, &c. Justification, stating that defendant, as lessee and grantee of the crown, committed the alleged grievances, &c., in exercise of the above right, doing no more than was necessary for the purposes aforesaid. Held, that the prescription was void, as being unreasonable. That a custom, similarly pleaded, was void on the same ground.

That the right, if maintainable in itself, might have been pleaded in virtue either of prescription or of custom.

And that it might have been claimed as well against copyholders as against tenants of customary freehold.

**CASE.** The declaration stated that plaintiff, before and at the time of the committing, &c., was, and thence hitherto hath been, and is, lawfully possessed of a certain messuage or dwelling-house with the appurtenances, situate in the manor of Newcastle under Lyme in the county of Stafford, belonging to and supporting which said messuage or dwelling-house, before and at the times aforesaid, there were certain foundations which plaintiff of right had enjoyed and was at the times aforesaid enjoying, and still ought to enjoy, for the support of the said messuage or dwelling-house, without hindrance or disturbance. And that, before and at \*the time of the committing, &c., a certain other messuage or dwell- [\*702 ing-house with the appurtenances, situate in the manor and county aforesaid, was in the possession and occupation of a certain person, to wit one John Hilton, as tenant thereof to plaintiff, the reversion thereof then and still belonging to plaintiff, and belonging to and supporting which last mentioned messuage or dwelling-house, before and at the times aforesaid, there were also certain foundations, which plaintiff for himself and his tenants of the same messuage or dwelling-house of right had enjoyed, &c., (as before.) Yet defendant, well knowing the premises, but contriving, &c., to injure, &c., the plaintiff, and to undermine the foundations of his said messuages or dwelling-houses with the appurtenances, and wholly to destroy the same, while plaintiff was so possessed of the said first mentioned messuage or dwelling-house with the appurtenances as aforesaid, and while the said other messuage, &c., with the appurtenances were so in the possession and occupation of the said tenant as such tenant thereof to plaintiff as aforesaid, and while plaintiff was so interested therein as aforesaid, to wit on, &c., and on divers days and times between that day and the commencement of this suit, without the leave or license of plaintiff, so wrongfully, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under ground near to the said several messuages, &c., with the appurtenances, and got, dug for and moved the ores, minerals and other produce of the said mines and substrata there, near to the said several messuages, &c., with the appurtenances, that, by reason of the premises, the said respective foundations of the said several messuages, &c., with the appurtenances then became and were \*greatly weakened, injured and damaged, undermined and rendered unsafe and unstable and incapable of supporting the [\*703 said messuages, &c., with the appurtenances as they would otherwise have done; insomuch that, by reason thereof, the said several messuages, &c., with the appurtenances, cracked, sank in, and are in danger of falling down and being wholly destroyed: by means of all which premises the

assigns, viz. that the said John Dunn the younger should and would, for and during the term of five years from the day of the date of the said deed, serve, abide and continue with defendant, his executors, &c., as his and their assistant, in the art and mystery of surgeon dentist, and diligently and faithfully exercise and employ himself in, and do, execute and perform, all such service, work and labour, relative to the said art and mystery, as defendant, his executors, &c., should from time to time order, direct, &c., in the way of his said art, &c., during the said term; and also that J. D. the younger should and would endeavour, by all due care and diligence, to promote the interest of defendant, his executors, &c., and would faithfully and truly serve him without embezzling, losing, &c., any of the money, goods, &c., of defendant, his executors, &c.: and, during the absence of defendant, should well and faithfully assist in the management of the said art, &c.: and also that he should not take in, do or perform, either on his own account, or for any other person or persons save defendant, any business relating to the said art, &c., without leave and consent of defendant, his executors, &c.: and that he should faithfully and diligently attend the work of defendant for nine hours each day, and should not absent himself from the service of defendant without his leave, &c., save through sickness or unforeseen accident: and defendant, for and in consideration of the services to be done and performed by and on the part of J. D. the younger as aforesaid, did, by the said deed, for himself, his heirs, executors, &c., “covenant, promise and agree with the said John Dunn the elder, his executors and administrators, that defendant, his executors,” &c., “should and would, during the said term of

\*687] five years (in case the said J. D. the younger should well and truly do and perform his part of that agreement, and particularly the work and labour of nine hours per day as thereinbefore stipulated, but not otherwise,) “well and truly pay or cause to be paid unto J. D. the younger the several weekly sums of money thereafter mentioned, that is to say, 35s. weekly and every week during the first year of the said term, 2l. weekly and every week during the second and third years of the said term, and 2l. 2s. weekly and every week during the fourth and fifth years of the said term, for wages and compensation for the services aforesaid,” as by the said deed, reference, &c. That J. D. the younger, before and at the time when the deed was made, was in the service of defendant as an assistant in his said art, &c.: and that, after the making of the deed, to wit 13th April, 1842, J. D. the younger, under and subject to the deed and upon the terms thereof, was in the service of defendant as such assistant as aforesaid, and commenced his service as such assistant, under and subject to the deed and upon the terms thereof, for the term of five years in the deed mentioned: and that he remained and continued in the said service, &c., from the time of making the deed until he was dismissed and discharged as after mentioned, to wit until a certain day after the making of the deed, during the said term, and before the commencement of this

suit, to wit 5th October, 1842; and that J. D. the younger, during all that time, according to the said deed in that behalf, did serve, abide, &c., and diligently and faithfully exercise, &c., and execute and perform, &c., as defendant from time to time ordered, &c., in the way of his said art, &c.; and did endeavour, &c., to promote the interest of defendant; and faithfully \*and truly served him without embezzling, &c.; and also, during the absence of defendant, well and faithfully assisted, [\*688 &c.; and did not take in or do, or perform, either on his own account, &c., any business relating, &c., without leave, &c.; and also did faithfully and diligently attend to all such work of defendant, for nine hours each day, as it was the business and duty of the said J. D. the younger to attend to, according to the said deed in that behalf; and did not absent himself, &c.: and also that the said J. D. the younger, after the making the said deed, whilst he was in the service of defendant as aforesaid, and until he was dismissed and discharged as aforesaid, well and truly did and performed his part of the said agreement, and particularly all such work and labour for nine hours, &c., as in the deed stipulated, &c.: that plaintiff and J. D. the younger have, and each of them hath, always from the time of making the deed until J. D. the younger was dismissed and discharged as aforesaid, well and truly observed, &c., on their parts, according to the tenor and effect, &c., of the deed. And, although the said J. D. the younger was, to wit on the day and year last aforesaid, ready and willing, and then tendered and offered, to continue so to do, and in all things to observe and perform his part of the said agreement, and also the said deed, on his part, until the end of the said term of five years in the said deed mentioned, (of which premises defendant then had notice,) yet defendant, after the making of the said deed, “during the said term of five years, and before the commencement of this suit, to wit on,” &c., “wholly refused to suffer or permit the said J. D. the younger any longer to remain or continue in his, the defendant’s, service, or to serve him as such assistant as aforesaid, according to the said \*deed in that behalf, or any longer to observe, perform or fulfil the said deed as [\*689 such assistant as aforesaid, or to do or perform his part of the said agreement; and then, after the making of the said deed, during the said term of five years, and before the commencement of this suit, to wit on,” &c., “dismissed and discharged the said J. D. the younger from and out of the service and employ of the defendant under and subject to the said deed; and hath, from thence until the commencement of this suit, being divers to wit three weeks, wholly refused to suffer or permit the said J. D. the younger to be in the service or employment of the defendant, or to serve him, or do or perform his duty as such assistant as aforesaid, according to the said deed in that behalf:” by means whereof, for and during all that time, &c., J. D. the younger hath been prevented from earning, &c., and hath not obtained, &c., and defendant hath not paid, &c., any weekly sum or sums, &c., “contrary to the said deed, and to the said covenant

September, next preceding the day of the date of that indenture for thirty-one years, from thence next, &c. By virtue of which several premises, defendant entered and became possessed, &c. And that, by virtue of the indenture, and in exercise of the rights, &c., thereby conferred, afterwards, and after the making of the indenture, and during the term, &c., to wit, on &c., defendant got, won and worked certain mines, &c., in the

\*707] said indenture mentioned and thereby \*granted, &c., as aforesaid, and situate near to the said messuages, &c., of the plaintiff, and within the liberties, townships or villages aforesaid, and within the manor or lordship aforesaid, and then, for the purpose of getting, winning and working the said mines, seams and veins of coal, &c., dug and made under ground certain mines, pits, shafts, holes and levels under certain lands, being part and parcel of the said manor or lordship, and situate within the said townships, and near to the said messuages or dwelling-houses of the plaintiff, with the appurtenances; the same mines, pits, &c., being expedient and necessary for that purpose; and then dug, got and moved from out of the said mines, pits, &c., certain large quantities of coal, &c., by the said indenture also granted; which said digging and making, &c., and digging, getting and moving, &c., is the working of mines and digging, &c., without leaving proper or sufficient support, &c., in the declaration mentioned: Whereby, and by means and reason of the premises in this plea aforesaid, the respective foundations of the said several messuages, &c., of the plaintiff unavoidably became and were a little weakened, injured, damaged, undermined and rendered a little unsafe, unstable and incapable of supporting the said messuages, &c., as they otherwise would have done, and the said messuages, &c., unavoidably a little cracked, sunk in, and were in danger of falling and being destroyed, in manner and form, &c.; defendants, on the said occasions, or any of them, in this plea aforesaid, doing no more than was necessary for the several purposes aforesaid, and doing no unnecessary damage to plaintiff.

Verification.

\*708] Replication to plea 3. As to the grievances therein \*mentioned with respect to the first mentioned messuage, &c., denial of the prescription: conclusion to the country. As to the messuage, &c., secondly mentioned, that, before the committing, &c., and before the making of the said indenture, to wit 15th July, 1807, George III. was seised in fee of the duchy, and, in right thereof, of the manor and minerals: that the tenements after mentioned were within, and parcel and customary tenements of, the manor, and demisable by copy of court roll in fee at the will of the lord, according to the custom of the manor: that, before the committing, &c., or the making, to wit, &c., at a special court baron, held on, &c., George III., being so seised, &c., granted the messuage, &c., with all out-buildings, ways, &c., easements and appurtenances, &c., to plaintiff in fee, to hold at the will, &c., according to the custom of the manor, by the rents and services thereof due and of right accustomed; by virtue of which grant

plaintiff, before the making, &c., entered and was seised, &c., and so continued until the committing, &c.; and that, before and at the time of the grant, the said dwelling-house was supported by the said foundations, and had no others, and they were part and parcel of the manor, and were necessary to the support, habitation and enjoyment of the said messuage, &c., so that without the same it could not stand or be used, inhabited or enjoyed, &c., and they continued so necessary, &c., until and at the time of the committing, &c.; and by reason thereof plaintiff and his tenants, &c., during all the times, &c., had, enjoyed, and of right ought, &c., as in the declaration mentioned. The replication then averred entry of John Hilton as tenant to plaintiff after the grant; descent of the duchy, manor, &c., from George III. to the queen as heiress \*of William IV.; and that defendant, claiming by colour of a certain surrender pretended to have been made by plaintiff, whereas nothing passed thereby, committed the grievances, &c. Verification. [\*709]

Rejoinder. As to the prescription, similiter. To the replication as to the second messuage, a special demurrer.(a) The plaintiff joined in demurrer.

Plea 4, stating, as to the grievances mentioned in plea 3, that the messuages were within the township, &c., and immemorially parcel of the manor, &c.; that the townships were immemorially parcel of the manor; and that the lord for the time being had immemorially been seised in fee of the collieries, mines, &c., within the manor. It then set forth an immemorial custom within the manor that the lord for the time being, and his tenants, &c., occupiers, &c., and all those to whom the lord had granted license, &c., have been used, &c.; in the same terms as those of the prescription in plea 3. The plea then stated that the Queen, being in right of her duchy, &c., lady of the manor, and seised, &c., by indenture, &c., granted and demised, &c., the rest of the averments were like those in plea 3. Verification.

Replication, in the same form, mutatis mutandis, as to the two messuages, with the replication to plea 3.

Rejoinder. As to the custom, similiter. As to the second messuage, that, according to the custom of the manor, the tenements in the replication mentioned as granted to plaintiff have been immemorially demised by copy of court roll, subject to the custom in the fourth plea mentioned, and that the last mentioned messuage, &c., were granted to plaintiff by George III. subject thereto.

\*Special demurrer, on grounds which it is unnecessary to state. Joinder. [\*710]

Pleas 5 and 6 stated the defendant to be occupier of the mines, &c., under the townships and within the manor, and alleged, respectively, a forty and a twenty years' prescription in the occupiers, to the same effect

(a) Nothing having ultimately turned upon the replication to plea 3 and the demurrer, it is unnecessary to state them more fully.

as the prescription in plea 3. Issues were tendered and joined on the prescriptions respectively.

The demurrers were argued in this vacation.(a)

Each party having demurred, *Kelly*, for the plaintiff, claimed the right to begin. *Erle*, contra, cited *Earl of Falmouth v. Thomas*, 3 Tyrwh. 26.(b)

Lord DENMAN, C. J. It is understood to be the practice that the party first demurring begins.

*Erle*, for the defendant. The replication gives no legal answer to the third or the fourth plea. The fact introduced by the replication, that the tenements are held by copy of the court roll, makes no difference; the prescription or custom, if valid, would attach as well on copyhold as on customary freehold, which, if the plea only were looked at, these tenements would appear to be; *Follet v. Troake*, 2 Ld. Ray. 1186. (The further argument as to the replication is omitted, the judgment having turned upon the pleas only.) The question then is, whether pleas 3 and 4 state a good prescription and custom; whether the ownership of the surface can law-

\*711] fully be \*made subservient to the ownership of the minerals in the manner stated on these pleadings. The plaintiff declares himself to be injured by losing the soil, which support he entitles himself to by his possession of, or reversionary interest in, certain houses. But that would not entitle him to claim support for his house from the adjoining land, unless it were shown that he had enjoyed such support for a time long enough to raise presumption of a grant from the landowner against whom he claimed: *Partridge v. Scott*, 3 M. & W. 220;(c) *Wyatt v. Harrison*, 3 B. & Ad. 871. Those cases show that the owner of a house has at least no better right in this respect than the owner of mere surface. The justification here is limited by the introductory parts of the third and fourth pleas, so as not to include any charge of negligence or improper exercise of rights; and the defendant claims to do, and alleges that he did, no more than was necessary for the purposes of the grant; those pleas, therefore, are not affected by the decisions in *Dodd v. Holme*, 1 A. & E. 493, and *Harris v. Ryding*, 5 M. & W. 60. As to the particular pleas: the prescription stated in the third plea is not unreasonable. If a party having two houses, and carrying on an offensive trade in one, sold the other with notice of the trade being so exercised, the purchaser could not bring an action for the nuisance. So, here; it may be assumed that the surface and the mines were once in the same proprietor; the surface might be of small value, the mines very valuable; is it unreasonable that the owner, parting with the surface, should stipulate that the enjoyment should be

\*712] subservient to all his mining rights; \*that the surface, if damaged, should be paid for, but that the tenant, if he chose to build, must

(a) February 5th. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, J.

(b) Where this point is mentioned in the marginal note; S. C., (but the point not observed upon,) 1 Cro. & M. 89.

(c) See *Acton v. Blundell*, 12 M. & W. 324, 352.

do so at his peril, and should not, by building, establish a right to stop the working of important mines under his tenement? The cases where a prescription or custom has been held bad, as tending to destroy the whole subject matter, do not apply here, as far, at least, as the surface is affected. The claim is only to do a temporary surface damage; the ground may sink, but, when it has settled, the surface right may be resumed. [Lord DENMAN, C. J. The surface will be gone.] A surface will remain, though not exactly the same. Prescriptions to exercise rights like those claimed here have been held maintainable if sufficiently grounded in point of fact. In *Lord Pelham v. Pickersgill*, 1 T. R. 660, (see p. 667,) the alleged right of an individual to take toll on a public highway was held good in law, it appearing that the soil and tolls were both formerly vested in the crown, so that the crown might be supposed to have given the right of passage in consideration of the toll. In *Bourne v. Taylor*, 10 East, 189, a plea alleging in the lord of a manor the liberty of boring for coal under copyhold land during the copyholder's estate was held valid; and in *Paddock v. Forrester*, 3 Mann. & G. 903, the prescriptive right, in this very manor, to mine under lands parcel of the manor, making compensation for surface damage, was pleaded, and not contested in point of law. A similar right, under an express grant, was treated as good in *The Earl of Cardigan v. Armitage*, 2 B. & C. 197. It will be contended that the supposed prescription, in the third plea, amounts really to a custom, and should have been pleaded accordingly. But the averments merely show that the plaintiff holds a \*customary freehold, over which the defendant [\*713 claims a dominion by prescriptive right.

As to the fourth plea: the allegation of custom has as much certainty as the subject matter admits of: and the custom, if it can have had a reasonable origin, is not rendered unreasonable by subsequent events. A custom rests on the supposition of an agreement; and that may be presumed here to have existed from time immemorial. It may be inferred, as TINDAL, C. J., points out in *Tyson v. Smith*, 9 A. & E. 406, (a) from the probable state of things when the practice originated: the occasion which existed for the license claimed by the one party, and the benefit which the other might derive from acquiescing in it. His lordship there (p. 425) says: "The custom, in fact, comes at last to an agreement, which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our own times, that it has become the law of the particular place." That applies to the present case: and it must be presumed that every one building on this land had notice of the law so introduced by general assent. *Bateson v. Green*, 5 T. R. 411, is a strong authority for the defendant. There the plaintiff was clearly entitled to common of pasture within a manor; but, it appearing in point of fact that the lord had always exercised a privilege without limit of digging for clay in the common lands, the court held that

(a) In Exch. Ch., affirming the judgment in Q. B.; S. C., 6 A. & E. 745.

the lord's right must prevail, though it followed that enough pasture was not left for the commoners. BULLER, J., said there: "Where there are two distinct rights, claimed \*by different parties, which encroach  
 \*714] on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other." "In general, one would say, that the lord's is the superior right, because the property of the soil is in him: but if the custom, established by evidence, show that it is subservient to the commoners', then he cannot use the common beyond that extent; otherwise he subjects himself to an action for the excess. But here the evidence shows, that the commoners' right to the enjoyment of the common has always been subservient to the lord's." In *Clarkson v. Woodhouse*, 5 T. R. 412, note (a) to *Bateson v. Green*; S. C., 3 Doug. 189, tenants of a manor had common of turbary and of pasture in right of their ancient messuages; and the lord alleged a custom for the owners of such messuages to have portions of the waste assigned to them for getting turves, and for the lord, after such portions had been cleared, to have the ground free from common; and this was alleged to be unreasonable, because it tended to destroy the right claimed by the commoners, and was repugnant to it. But the court held it good; Lord MANSFIELD saying: "This is a qualification of the right; suppose it introduced at the same time with the grant, the grantor might qualify it in any way." [COLERIDGE, J. The judgment there does not go the length of that in *Bateson v. Green*, 5 T. R. 411, in sanctioning an actual destruction of the common.] In *Folkard v. Hemmett*, 5 T. R. 417, note (a) to *Bateson v. Green*, where, in an action for disturbance of common, the defendant relied upon a grant of soil by the lord, with consent of the homage, for the purpose of building,  
 \*715] DE \*GREY, C. J., assumed the possibility that the lord might originally have reserved the right to make such grants. [COLERIDGE, J. Suppose an agreement in fact between the lord and tenant, that the tenant may build on the land, the lord reserving to himself the right to dig mines under the buildings. If that is inconsistent with their safety, is not the reservation repugnant to the grant?] The parties might agree that the lord should reserve such a right. In *Place v. Jackson*, 4 Dowl. & R. 318, the right to common of pasture awarded under an enclosure act was held subservient to the lord's manorial right of digging stone, though his exercise of it necessarily destroyed the pasture for a time. In *Broadbent v. Wilks*, Willes, 360, (see *Clayton v. Corby*, ante, p. 415,) in the Court of Common Pleas, though the alleged custom (for the lord, when sinking coal pits, to throw and place the rubbish on the land near to such pits, being customary tenement, &c., there to remain,) was held bad, yet WILLES, C. J., in delivering judgment said: "The objection that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on the account of this disadvantage to his tenant." A custom for the lord to enclose

without restriction parcels of the waste over which customary tenants of the manor had right of common was held, in *Arlett v. Ellis*, 7 B. & C. 346, to be illegal; but there it was taken as established that a right of common existed to which the alleged custom for the lord to enclose would be repugnant. And BAYLEY, J., distinguished the case from *Bateson v. Green*, 5 T. R. 411, saying that, in the case then before the \*court, “the right claimed” was “to sever and take away permanently from [716 the common a beneficial part of it, so as to deprive the commoner of any power or right over that part;” that, in *Bateson v. Green*, 5 T. R. 411, the immemorial usage to dig was deemed evidence for the lord that “when he granted out the right of common to the commoners he reserved to himself the right of digging clay:” and his lordship added: “It frequently happens that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain; and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them, he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. A case of that sort is distinguishable from the present, because the lord still leaves for the benefit of the commoner something capable of yielding food for his cattle. The user of the privilege by the lord from time to time is evidence to show that he reserved that right to himself; and the nature of the substance which is taken from the earth shows that such reservation was not unreasonable.” Here the destruction is not necessarily permanent; and the reservation is not unreasonable, nor repugnant to such rights as the lord may be supposed to have granted. [COLERIDGE, J. You say that the lord gave leave to build a house, but \*reserved the right of pulling it down again.] He might. The grant may have been [717 made subordinate to the mining right. He may have said, “take the surface, and cultivate it; or build upon it, but at your peril.” The right of bounding (discussed in *Doe dem. Earl of Falmouth v. Alderson*)(a) is not a less encroachment on the other rights in the soil than this. [WIGHTMAN, J. There is a case on that subject now depending.(b)] The queen is entitled by the prerogative to all mines of gold and silver within the realm; and, if they be in the land of a subject, she (as was laid down in *The Case of Mines*, Plowd. 310, 336,) has “liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.” These rights of ownership are subservient to the mining right by the common law. Many of the old cases as to customs and prescriptions are collected in *Hix v. Gardiner*, 2 Bulst. 195. The

(a) Note to the case of *Vice v. Thomas*, by Smirke, 1843, page 39; S. C., 1 M. & W. 210, Tyrwh. & Gr. 543.

(b) *Rogers v. Brenton*, argued in Q. B. January 23d, 1845.

judgment of the Exchequer Chamber in *Tyson v. Smith*, 9 A. & E. 422, refers to *Mille v. Benet*, Yearb. Trin. 2 H. 4, 24 B. pl. 20, as showing that a custom "that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord." But the reason is not so stated in the Year book.

The preceding argument applies to the pleas taken alone: but, if the replication, showing that the tenements claimed by the plaintiff as reversioner are copyhold of the manor, may be taken into consideration, it  
 \*718] makes the case stronger for the defendant, because a \*copyholder has no right to build on the land: or, even if he can, he must not do so to the lord's prejudice; and the house, if built, is subject to all the manorial customs; Gilb. Ten. 305, and note(c) by Watkins.(a)

It will further be contended that the demise, as stated in the pleas, does not appear to have been made according to 1 stat. 1 Ann. c. 7, s. 5. But this, if it be a defect, is cured by the plaintiff's pleading over; *Bishop of London v. Mercer's Company*, 2 Stra. 925, 931; *Fletcher v. Pogson*, 3 B. & C. 192. The demise would at all events be good during the life of the queen.

*Ke'ly*, contra. The question is, whether the crown or its grantee may exercise mining rights in this manor by injuring the foundations of dwelling-houses without notice or compensation; and that, as to houses admitted to be immemorial. It is indeed alleged, as a custom or prescription, that the lord or grantee may mine under dwelling-houses. If any such custom or prescription could exist, it must be taken as implied that the parties mining should leave pillars capable of supporting any habitations above; which is often done. But, on the authorities, a custom or prescription like this must be void, because it destroys the subject matter of tenure, and because it tends to a common nuisance. The origin of valid customs is traced in *Le Case de Tanistry*, Davys, 28 b, 31 b, &c. Such a custom as this can never have been introduced, in the manner there pointed out, by approbation and consent of the people, and repeated  
 \*719] use. Nor has it the properties \*stated there, (and admitted in *Tyson v. Smith*, 9 A. & E. 421,) to be inseparable from a good custom; it cannot have had a reasonable commencement, or continuance without interruption from time immemorial; nor is it certain. And it has the character, ascribed to bad customs in *Le Case de Tanistry*, Davys, 32 b, of being injurious to the multitude and prejudicial to the commonwealth, and therefore probably commenced in extortion and oppression. *Broadbent v. Wilks*, Willes, 360, decides the present case; and the custom pleaded here is more objectionable than the custom there held void. In *Badger v. Ford*, 3 B. & Ald. 153, this court refused to presume, from evidence of usage, that the lord of a manor had originally reserved to

(a) 5th ed. And see 1 Watkins on Copyholds, 331, ch. 8; *Doe dem. Grubb v. The Earl of Burlington*, 5 B. & Ad. 507, 510.

himself a power to divest copyholds of their right of common: that case decides that a custom for the lord to annihilate even an incident of his grant cannot legally exist. And BAYLEY, J., says, in *Arlett v. Ellis*, 7 B. & C. 365, after referring to *Badger v. Ford*, 3 B. & Ald. 153: "Had there been no authority, I should have thought, that wherever it is once established that a right of common has existed from time immemorial, such a privilege or custom in the lord cannot by law be supported, because it would be in destruction of that right of common." *Arlett v. Ellis*, 7 B. & C. 346, seems to be the only case in which a distinction is drawn between a partial injury to the right, and a total destruction of the subject matter: but, if the custom goes only to the former extent, it may be presumed that, in consideration of it, a smaller price is taken for the tenement; whereas, if the claim by custom be to make the tenant's dwelling-house uninhabitable at the lord's pleasure, the presumption of such a bargain cannot be entertained. *Harris v. Ryding*, 5 M. & W. 60, shows that, if the owner of land grants it, reserving to himself a right to enter and dig for minerals under the surface, that reservation does not entitle him to dig without leaving proper support. And, supposing that the right here claimed could exist by reservation, the plea is bad because it does not aver that the defendant and his predecessors have in fact done damage to houses in exercise of the right; *Flight v. Thomas*, 10 A. & E. 590. [\*720]

If this right be claimed by prescription, the lord cannot prescribe against his copyhold tenant. [COLERIDGE, J. It does not appear on the pleas that the premises are copyhold. PATTESON, J. There is nothing on record to show it, if the replication is given up.] Considering the tenement as a customary freehold; a prescription, to avail against the tenant, must be reasonable. It must be supposed here to rest on a grant made by the plaintiff's predecessor to the defendant's; and the grant in question is not likely to have been so made. [PATTESON, J. It is hardly supposable unless the owner of the dwelling-house was owner of the mine also.] If this is an immemorial freehold, the prescription as to that stands as high as the prescription to use the mines. [COLERIDGE, J. The messuages are alleged to have been always parcel of the manor.] It is incredible that premises should ever have been taken subject to the condition supposed. [PATTESON, J. The tenant may have given much less for the land on account of it.] That answer cannot avail where the nature of the reservation is repugnant to that of the grant. In Shepp. \*Touchst. 79, c. 5, s. 7, it is laid down that an exception is void "if the exception be such as it is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it; or grant a manor, excepting the services; these are void exceptions." On the same principle, [\*721]

of repugnancy, tenants of a manor cannot claim common, as such, to the entire exclusion of the lord; *Potter v. North*, 1 Ventr. 383.(a)

Again, prescription, or a custom, to create a nuisance, is bad. Thus, "if lord of a vill prescribes to have a warren in all the land within the vill held of him, this is not good; for conies dig holes in the land;" 17 Vin. Abr. 265, *Prescription* (G,) pl. 4. And in *Dewell v. Sanders*, Cro. Jac. 490, this court agreed, as to a dovecot, that, "if it were a common nuisance, neither the lord of the manor, nor the parson, could erect a dovehouse more than any other freeholder, for none can prescribe to make a common nuisance; for it cannot have a lawful beginning:" and *Fowler v. Sanders*, Cro. Jac. 446, was referred to.

As to the cases cited for the defendant: in no instance did the right which was held valid extend to the total destruction of the tenement subjected to it. [PATTESON, J., referred to the case cited in *Wyrley Canal Company v. Bradley*, 7 East, 368, 371, 372, "where the owner of a house near Newcastle, which was undermined by a colliery of the late Lord Lonsdale, and fell down in consequence of it, \*recovered damages against him."]  
 \*722] No report of the case has been found. A similar complaint was stated in the declaration in *Earl of Lonsdale v. Littledale*, 2 H. Bl. 267, 299; but nothing applicable to this case was decided. In *Lord Pelham v. Pickersgill*, 1 T. R. 660, and *Bourne v. Taylor*, 10 East, 189, the right claimed did not go to the destruction of the subservient tenement. In *Paddock v. Forrester*, 3 Man. & G. 903, and *The Earl of Cardigan v. Armitage*, 2 B. & C. 197, it was not made a question whether the prescription set up was in its nature legal. In *Bateson v. Green*, 5 T. R. 411, the decision does not go so far as the statement of the law in the marginal note; Lord KENYON, said only that, if the lord had always dug in the common and taken what clay he pleased, no action would lie "although the commoners have been abridged of their enjoyment of some part of the common." If the decision goes the length of sanctioning an entire destruction of the common, it is not law; and it is not sanctioned by the court, as going to that extent, in *Arlett v. Ellis*, 7 B. & C. 365, 373. Indeed the authority of *Bateson v. Green*, 5 T. R. 411, was treated as doubtful by Lord COTTENHAM, C., in the present case, *Hilton v. The Earl of Granville*, 1 Craig & P. 283, in Chancery. The partial diminution of the waste in *Clarkson v. Woodhouse*, 5 T. R. 412, note (a) to *Bateson v. Green*; S. C., 3 Doug. 189; *Folkard v. Hemmett*, 5 T. R. 417, note (a) to *Bateson v. Green*, (where the homage consented) and *Place v. Jackson*, 4 Dowl. & R. 318, is very different from a usage wholly destructive of the very subject matter. (Kelly then proceeded to argue that the replication to plea 3 was good, inasmuch as the  
 \*723] grant of \*a house with foundations necessary to it was an implied contract by the crown that the grantee should enjoy such founda-

(a) It appears that no judgment was given. According to the report of S. C., 1 Sand. 350, the court inclined to think the prescription good. See note (2,) ib. 353, (6th ed.)

tions, and he argued that the right now asserted by the defendant was in derogation from such grant, citing *Harris v. Ryding*, 5 M. & W. 60, and *Hinchliffe v. The Earl of Kinnoul*, 5 New Ca. 1. He also contended that the rejoinder to this replication was bad. And that the demise stated in the pleas was void under 1 stat. 1 Ann. c. 7, s. 5.)

*Erle*, in reply. The main question on which the decision of this case must turn is, whether the prescription, or custom, be or be not valid. The unreasonableness of the custom is inferred from an exaggerated statement of hardship; but the defendant is as much entitled to assume that the amount of damage is very low in proportion to his interest in the mines as the plaintiff that is very high. In fact there is only one instance before the court in which dwelling-houses have been injured by exercise of the defendant's right. It is represented that the defendant claims to destroy dwelling-houses at will; but the real state of the case is, that the tenant has been content to build over the lord's mine, and to enjoy the dwelling-house, subject to the contingency that, if the mining operations come near the house, its foundations may be interfered with. It does not appear that the dwelling-house (as well as all others subject to the custom) has not been enjoyed for several hundred years without that contingency happening. And, if the house is at last undermined, the land which the tenant originally took remains, and may be built on again. The defendant is entitled to assume any state of facts in which the custom or prescription may have legally originated; and, if the party taking the surface agreed with the lord that he might carry on his mining operations, making compensation for damage to the surface, but not to dwelling-houses built upon it, that would be a legal origin. If an express grant to that effect were pleaded, the plea would be good. The reservations in *The Earl of Cardigan v. Armitage*, 2 B. & C. 197, and *Harris v. Ryding*, 5 M. & W. 60, did not go to such an extent; but it is clear that, if they had, the court would not have deemed them invalid. In *Flight v. Thomas*, 10 A. & E. 590, the particular privilege claimed had not been exercised; there was no proper allegation of its existence: and it was of a very different nature from the right here asserted. The doctrine of *Partridge v. Scott*, 3 M. & W. 220, favours the defendant's case. The plaintiff's house has enjoyed the support now taken from it; but the defendant shows the terms on which that took place; and his act is justified by them. The argument that prescription or custom cannot justify a nuisance is not applicable. [Lord DENMAN, C. J. This would not be a common nuisance unless the record showed that it happened in a public street.] The complaint here as to houses is really only a mode of raising the question whether the owner of mines may carry on his operations if the surface hereby be affected. [WIGHTMAN, J. You claim here to destroy the dwelling-house. Lord DENMAN, C. J. And the persons in it. WIGHTMAN, J. You allege a right to injure the foundations, without any necessity of giving notice.] In the use of easements which are un-

doubtedly legal, mischief may be done if the right be exercised carelessly;  
 \*725] a person riding or \*driving on a highway may injure passengers by coming upon them too suddenly; but it is not to be presumed that the right will be unreasonably exercised. So, here, the record does not state that the owner of the mines is to give notice, or use any other precaution; but it does not follow that he claims to omit doing good what the use of his right reasonably requires. And it is averred that the defendant, at the time in question, did no more than was necessary for the purposes in the plea mentioned. Lord COTTENHAM, C., in the case between these parties in Chancery, (a) refused an injunction to stay the working of the mines, at the same time giving the direction under which the present action is brought. He treated the question on the validity of the lord's right as doubtful on the authorities: but the greater part of his judgment is opposed to the argument now urged for the plaintiff.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

This is an action on the case for injuring two ancient houses, one occupied by the plaintiff, the other held under him by a tenant. These acts are justified by a prescription, stated in the third plea, and by a custom set out in the fourth, by which a right is claimed for the defendant as lessee of the manor of Newcastle under Lyme. (His lordship here stated the claims of the right as alleged in the pleas.)

These pleas are demurred to as setting forth a prescription or custom which cannot be sustained at law, because unreasonable. In considering  
 \*726] the question, we \*make no distinction between the two pleas. They are the same with reference to the objection. If either the prescription or the custom is bad on that account, the other must be bad likewise; and, if the one is valid in law, the other may be valid also. We also think that the question whether these houses are freehold or copyhold does not affect that which I have just stated. If the custom can so far prevail as to attach on all the freehold houses within the manor, it might also attach on all ancient copyhold houses, such as the defendant has described these two houses.

The principle upon which this custom is said to be invalid is laid down by WILLES, C. J., in *Broadbent v. Wilks*, Willes, 360. The paragraph was cited by both parties in the argument. "The objection that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on account of his disadvantage to his tenant. But the true objections to this custom are, that it is uncertain and likewise unreasonable, *as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that the tenant at first would come into such an agreement.*"

The custom thus held invalid was this, that, "when and as often as the

(a) *Hilton v. The Earl of Granville*, 1 Craig & P. 288, 292, &c.

lord of the manor or his tenants of the collieries or coal mines" "have sunk pits in the freehold lands in Halton," "for the working of the said collieries there to get coals coming and arising from thence," the lord and his tenants "have used and been accustomed to throw, cast and place" "the earth, clay, stones," &c., "coming therefrom together in heaps on the land near to such pits," "there to remain and continue, and to" place "wood there for the necessary use of the said pits, and to take and carry away from thence with carts" "part of the said coals so laid and placed there, and to burn and make into cinders there other part of the said coals" "at his and their will and pleasure." [\*727]

Lord Chief Justice WILLES, after pointing out the uncertainty of the alleged custom, proceeds: "And certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits when and as often as they please, and may in such case lay their coals, &c., on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please;" "so they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable."

The case was removed by writ of error from the Court of Common Pleas into this court: after being argued several times, the judgment was unanimously affirmed.(a) Lord Chief Justice LEE said (2 Stra. 1225,) that the question was, "whether this was a reasonable *lex loci*, which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either public or private. That it savoured of an arbitrary power, and might (as laid) put it in the power of the lord, totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word *near* was too vague and uncertain." \*The report in Wilson, after mentioning the vagueness of that word, remarks also that the custom is "very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often, and when he pleases;" "and what was said at the bar touching the public utility of coal pits to the realm cannot be considered, for the pits may be worked without this custom, for ought that appears to the contrary;" "and to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common encounter *son demise quia est part del chose demise*, Palm. 212,(b) [\*728]

(a) *Wilkes v. Broadbent*, 1 Wils. 63; S. C., 2 Str. 1224.

(b) *White v. Sayer*, Palm. 211.

and this custom being pleaded to be at the will and pleasure of the lord; tends to make him judge in his own cause, which the law will not endure.”

There can be no necessity for showing by a comparison of details that the custom now pleaded is far more oppressive than that which was thus deliberately condemned by both courts. The words “at the will and pleasure of the lord” do not indeed appear in the present record; but such is the effect of the claim; for the lessee of the duchy and his subtenants assume the power of entering any lands within the manor, and searching for minerals without any restriction as to times and seasons, or the mode of occupation or culture. Several cases were cited to show that such a custom might be valid. The most recent, *Paddock v.*

\*729] *Forester*, 3 M. & G. 903, though arising in the same district,

has no bearing whatever on the point before us. The plaintiff there sued for trespass in digging and taking away his land and the coal ore there. The defendant justified in his third plea under a custom stated generally, and, in his fourth, under the same custom as qualified by a right to compensation. The general custom was traversed: under the special custom, the defendant pleaded that he had made sufficient compensation. At a trial at bar in the Court Common Pleas, the jury found the compensation insufficient,<sup>(a)</sup> and the court directed a verdict for the plaintiff on the third plea, holding that it was not supported by proof of the qualified custom. The injury to foundations was in no way connected with that trial.

The greatest reliance, however, was placed on some decisions in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson v. Green*, 5 T. R. 411, is the strongest of these cases, where the lord of a manor defended himself successfully against a commoner whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so. The language of Lord KENYON is certainly large, though considered by BAYLEY, J., in *Arlett v. Ellis*, 7 B. & C. 346, to be

\*730] subject to some restriction. If, indeed, it must be \*taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson v. Green*, 5 T. R. 411, are much more cautiously worded: and in that of *Folkard v. Hemmett*, 5 T. R. 417, note (a) to *Bateson v. Green*, Lord Chief Justice DE GREY expressed himself conformably to what we consider the true

(a) The compensation was found sufficient. See the report, p. 923. The entry of the verdict is, however, inaccurately stated in the report, as to the first and second issues. The verdict on the plea of not guilty was for the defendants as to getting the earth, soil, and stones, and for the plaintiff as to the residue. On the plea of not possessed, the verdict was for the defendants as to the coals, culm, ore, and other minerals, and for the plaintiff as to the residue. The defendants had also a verdict on the fourth plea, besides others; and they had accordingly judgment as to all the complaint.

legal principle. "The defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord;" and assuredly whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument.

Our speedy decision was requested by both parties: and our opinion, being clear, ought not to be delayed. If it is wrong, it may be placed immediately in the proper train for correction.(a)

Judgment for plaintiff.

(a) The issues of fact were tried at the Staffordshire Summer assizes, 1844, before Tindal, C. J., when a verdict was found for the plaintiff on all the issues. A rule nisi for a new trial was obtained in Michaelmas term, 1844, and was made absolute in the vacation after Trinity term, 1845, on grounds not involving the points raised in the above reported case.

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\*GREVILLE v. CHAPMAN, HENRY LAMB and THOMAS LAMB. [\*731]

Declaration for libel alleged that a horserace was run for stakes raised by subscription to wit 9,100*l*. by 182 subscribers, at which a horse C. had been entered, and the owner was entitled either to let such horse run or to withdraw him: that plaintiff, after C was entered and before and at the time of the race, became owner of C.; that C. became lame and unfit to run, and plaintiff withdrew him; that defendants published a libel, which was set out, and which imputed that plaintiff had betted against C., remarked on the time at which the lameness appeared, and stated that the withdrawing him was an infernal robbery. Defendants pleaded not guilty, and several pleas in justification, some alleging in substance the truth of the above imputations; but all the issues were found for plaintiff: and it did not otherwise appear on the record that plaintiff had in fact betted.

*Held*, that the plaintiff was entitled to recover, for that there was no illegality in a horse-race run without fraud; and, even if there were, plaintiff was entitled to protection of his character in respect of other matters connected with the transaction.

Although, in the course of plaintiff's evidence, for the purpose of identifying himself as the party libelled, he showed that he had actually betted more than 10*l*. on the event of the race.

A witness for plaintiff stated, on cross examination, that by the rules of The Jockey Club the owner of a horse might bet against his own horse and then withdraw him. *Held*, that the witness might be asked, on re-examination, whether he did not consider such conduct dishonourable.

CASE. The first count charged that, before and at the time of the committing, &c., to wit 25th May, 1842, a certain race, called The Derby Race, had been and was run at a certain place called Epsom Downs near

Epsom, in Surrey, by and between a certain horse called Attila and a certain other horse called Robert de Gorham and divers other horses, for certain stakes, amounting altogether to a large sum, to wit 9,100*l.*, subscribed by divers, to wit 182, subscribers; that Attila won the race and Robert de Gorham came in second: and, before the race was run, a certain horse called Canadian had been and was entered as one of the horses for running the same; and the owner thereof was entitled to have the same run in the same race, or to withdraw the same from the running in the same, as he might think fit; that, after the said horse called Canadian had been entered to run the race, and a short time before the race was

\*732] run, to wit 9th May, 1842, plaintiff \*became and was the purchaser of Canadian; and, before and at the time when the race was run, and also at the time when Canadian was withdrawn from the race as after mentioned, was the owner of Canadian; and, but for the unfitness of the same to run in the said race as after mentioned, it was the intention of plaintiff that the same should run, and the same would have run, in the same: that, a short time before the race was run, to wit 23d May, 1842, Canadian was discovered to be and was lame, and was afterwards, to wit 23d May, 1842, carried and conveyed in a van to Epsom aforesaid in order that the said last mentioned horse might run in the said race if he should be able or in a fit or proper state so to do: that the said horse continued to be and was lame from the day and year last aforesaid until a certain other day shortly before the race was run, to wit until 24th May, 1842, when, the said horse being and continuing lame and unfit to run, and incapable of running in the race, and being then in such a state that it would have been injurious to him to run in the said race, plaintiff withdrew him from, and would not suffer or permit him to run in, the said race; nor did the same run therein: that, at the time of the withdrawing of the said horse from the said race as aforesaid, there was no probability that the said horse could recover his said lameness in time to run or be fit or capable to run in the said race; and that the said horse continued and was lame and unfit and incapable to run in the said race until and at the time when the same was run. That, before the running of the race, and before and at the time of the committing, &c., divers persons had associated themselves together, and formed a club called The Jockey Club, and plaintiff had become and was a member of that club. And,

\*733] \*before and at the time of the committing of the grievance by the defendants as hereafter mentioned, the principal and ordinary signification and meaning of a statement or the term that a person had betted ten thousand to three hundred against a horse entered and engaged for running a race with another horse or horses was and still is that he had betted and wagered with another person or persons 10,000*l.* to 300*l.* that such horse would not win such race, and that last mentioned person or persons had betted and wagered with him 300*l.* to 10,000*l.* that such horse would win the said race. And before and at the time of the com-

mitting, &c., (similar explanation of a bet of 10,000*l.* to 100*l.*) And, before and at the time of the committing, &c., the principal and ordinary signification and meaning of a statement or the term that a person had laid the odds to the amount of 1500*l.* more, when made and used in reference to a previous statement that such person had betted and wagered with another person or persons a large sum of money to a less sum that a horse entered and engaged to run a race with other horses would not win such race, was and still is that he had still further betted and wagered with another person or persons to the amount of 1500*l.* to a sum or sums not amounting to 1500*l.* that such horse would not win such race. Yet defendants, well knowing, &c., but contriving, &c., to injure plaintiff in his good name, &c., and to bring him into public scandal, &c., and to cause it to be suspected and believed that he the plaintiff had been and was guilty of the misconduct after mentioned to have been imputed to his charge, heretofore, to wit 29th May, 1842, in a certain newspaper called "Sunday Times," falsely, wickedly and maliciously, did publish a certain false, \*scandalous, malicious and defamatory libel, containing the false, scandalous, malicious, &c., matter following, of and concerning plaintiff, and of and concerning the said race so run as aforesaid, and of and concerning the said horse called Canadian and the said horse called Robert de Gorham, and of and concerning the said horse called Canadian having been so entered and engaged to run the said race, and of and concerning the same having been so taken to Epsom as aforesaid, and of and concerning the withdrawing of the said horse called Canadian from the race aforesaid, and of and concerning the 24th day of May, 1842, and also of and concerning the said association and club called The Jockey Club (that is to say :)

"And now, to wind up with a few words on the Canadian affair," (meaning the withdrawing of the said horse from the said race as aforesaid,) "to what a degree of degradation and contempt is 'The Jockey Club'" (meaning the said association, &c.) "reduced, when its own members, the turf legislators themselves, laugh to scorn the power of its laws, and publicly and unblushingly charge each other with practising a most iniquitous system of turf trickery and deceit. 'The scene that was enacted at the Spread Eagle at Epsom, on Tuesday night,'" (meaning the night of Tuesday, the 24th of May, 1842, aforesaid) "will, it is to be hoped, from the exposure that took place, operate as a caution to the honest better to distrust the man, however high his rank, who, after having laid his thousands against a horse, becomes its purchaser within a few weeks before the race comes off, for which that horse, by his public performance, has elevated himself into very high favour, and to whose capabilities there is every probability attached that he will pull triumphantly \*through. Canadian," (meaning, &c.,) "the stable companion of Robert de Gorham," (meaning, &c.,) "could give the latter a large lump of weight and still beat him cleverly. What conclusion, then, may we draw from

this fact, as to the probable issue of the Derby," (meaning the said race, &c.,) "had Canadian," (meaning, &c.,) "started" (meaning started in the said race?) "But Canadian" (meaning, &c.) "was sold; and a lame excuse is better than no excuse at all. The horse" (meaning the said horse called Canadian) "is, however, brought to the appointed place of contest: the deception is carried on until the very day before the race," (meaning, &c.,) "and then the bubble bursts. The horse," (meaning the said horse called Canadian,) "is, at the eleventh hour nearly, discovered to be lame and must therefore be drawn" (meaning withdrawn from the said race.) "Was the horse" (meaning the said horse, called Canadian) "lame when he got into the van or when he came out of it? That is the question. Why it was fearlessly declared in the presence of a large body of the sporting fraternity, at the place previously alluded to that the then owner of Canadian (meaning plaintiff) "had on the 'Thousand Day,' at Newmarket, stated that he" (meaning plaintiff) "had betted ten thousand to three hundred against the horse," (meaning the said horse called Canadian,) "and which bet he" (meaning plaintiff) "considered at the time that it was laid to be a good one: that, when Canadian" (meaning, &c.) "fell lame, he had betted ten thousand to one hundred against him," (meaning the said horse called Canadian;) "and that, on that very day," (meaning 24th May, 1842, aforesaid,) "he" (meaning plaintiff) "had laid the odds to the amount of one thousand five hundred more. If \*this statement is correct, and there is little doubt  
 \*736] of it, for the integrity of the gentleman who made it cannot be impugned, and he even offered to appear before any tribunal and take oath as to its truth, then the denouncements that the Canadian affair" (meaning the withdrawing of the said horse called Canadian) "from the said race as aforesaid was 'nothing short of an infernal robbery' are fully justified; and an indelible blot will henceforth lie on the escutcheons of those persons" (meaning, amongst others, the plaintiff) "who perpetrated it." By means, &c.

Pleas. 1. Not guilty. Issue thereon.

2. That it was not plaintiff's intention that the horse Canadian should run, in manner, &c. Issue thereon.

3. That the horse was not discovered to be, nor was, lame before he was carried and conveyed in the van, in manner &c. Issue thereon.

4. That the horse was not lame or incapable of running, in manner, &c. Issue thereon.

5. That, after the horse had been entered, and before plaintiff became owner, plaintiff betted sums of money, each exceeding 10*l.*, that the horse would not win the race, with divers persons who betted with plaintiff that the horse would win: that plaintiff had stated on the Thousand Day at Newmarket that he had bet 10,000*l.* to 300*l.* against the horse winning, and considered the bet, when laid, to be a good one: that he had also stated that, when the horse became lame, he had betted 10,000*l.* to 100*l.*

against the horse winning : that plaintiff afterward became owner of the horse for the purpose that he might dishonestly and dishonourably withdraw the horse from running and winning, and that plaintiff might thereby win the moneys, &c. : whereupon \*the defendants, &c. (justification.) Replication, De injuriâ. Issue thereon. [\*737]

6. That, after the horse had been entered, to wit 10th April, 1842, called in the supposed libel The Thousand Day at Newmarket, plaintiff stated that he had betted 10,000*l.* to 300*l.* against the horse's winning the race, and that, when the horse fell lame, he had betted 10,000*l.* to 100*l.* against the horse's winning the race ; averment that, after the horse had been entered, to wit 1st January, 1842, and on divers, &c., afterwards, plaintiff did bet with other persons sums of money each exceeding 10*l.*, and amounting, to wit, to 30,000*l.*, that the horse would not win : that plaintiff afterwards, and before the race was run, to wit 24th May, 1842, without any fair, just or proper cause in that behalf, wrongfully, dishonestly and dishonourably withdrew the said horse from, and would not suffer or permit the same to run in, nor did the same run in, the said race ; with the intention, and for the purpose and in order, that the plaintiff might thereby win the said moneys, &c. : wherefore defendants, &c. (justification.) Replication, De injuriâ. Issue thereon. .

7. That, after the horse had been entered, to wit 1st December, 1841, plaintiff did bet with divers persons sums of money each exceeding 10*l.*, and amounting, to wit, to 30,000*l.*, that the horse would not win ; that plaintiff afterwards, and before the race was run, to wit 24th May, 1842, wrongfully, dishonestly, and dishonourably caused and procured the said horse to become, and the same then was, by such cause and procurement, lame and unfit to run, and incapable of running in and winning the said race ; and plaintiff so caused and procured the said horse to become lame and unfit to run, and incapable of running, in the said race, with the \*intention, and for the purpose and in order, that plaintiff might thereby win the said moneys, &c. : wherefore defendants, &c. [\*738] (justification.) Replication, De injuriâ. Issue thereon.

On the trial, before Lord ABINGER, C. B., at the Surrey Summer assizes, 1842, the publication was proved ; and evidence was given as to the lameness of the horse, and the circumstances under which he was entered and withdrawn. It was proved by plaintiff that he was the owner of Canadian at the time of the withdrawing, and had, at that time, bets against Canadian's running, amounting to sums considerably above 10*l.* This appeared on the examination in chief : but it also appeared that, if Canadian had won the race, the plaintiff would have won a considerable sum more than he gained by the withdrawing. A witness, called for the plaintiff, stated, on cross-examination, that he was a member of The Jockey Club, and that the owner of a horse entered for the race was entitled to withdraw him without giving any reason, and such owner, if he had betted against the horse's winning, would be entitled to receive the money. The wit-

ness, on re-examination, was asked what was his opinion respecting the morality of a case where a party has betted against his own horse, and afterwards withdraws him. The counsel for the defendants objected to the question; but the lord chief baron overruled the objection. The witness then answered as follows. "It is not consistent with the principles of honour for a person to bet largely against his horse and then to withdraw him. No person who acted according to the principles of honour would be guilty of a thing of the kind. I think that no man guilty of such an  
 \*739] act would be tolerated in society. \*If such a case were brought before The Jockey Club, I should think he would be expelled. I should vote for his expulsion."

At the close of the plaintiff's case, the counsel for the defendants contended that, upon the evidence, no action was maintainable, inasmuch as the plaintiff founded his complaint upon a grievance which affected him only in the character of a party who had committed the illegal act of betting to the amount of more than 10*l.* upon a horserace.(a) The lord chief baron held that this did not prevent the plaintiff's recovering in the present action.

Verdict for plaintiff on all the issues.

In Michaelmas term, 1842, Sir *W. W. Follett*, solicitor-general, obtained a rule nisi for a new trial, on the grounds of misdirection and the reception of improper evidence.

In last Michaelmas vacation,(b)

*Thesiger*, *Peacock*, and *Hodges* showed cause. First, as to the objection from the supposed illegality. No objection to the legality can be taken under the plea of not guilty; and the other pleas have no application to such a point. The plea of not guilty denies only the publication, the meaning alleged, and the malice: it has the same effect as a plea of not guilty to a declaration for slander, which puts in issue nothing that the  
 \*740] same plea would not have put in issue before the new rules; \*R. Hil. 4 W. 4, IV. 1, 5 B. & Ad. ix. It is true that the fact of the bets having been laid arose upon the evidence for the plaintiff; and it will be contended that, although the defendants could not have given evidence of facts showing illegality, they are entitled to object to the illegality when the plaintiff himself rests his case upon facts which show it. But the libel itself imputes the fact of the betting as well as the fact of the fraud: the laying of the bets was not a necessary part of the plaintiff's case. In *Fenwick v. Laycock*, 1 Q. B. 414, the plaintiff's evidence disclosed a contract alleged to be illegal: but it was held that the objection could not be taken on a plea of *nunquam indebitatus*. The cases which will be relied upon for the defendants are distinguishable. In *Morris v. Langdale*, 2 B. & P. 284, on special demurrer, a declaration for slander was held bad, because

(a) See *Skillito v. Theed*, 7 Bing. 405, and the other authorities referred to in *Bentinch v. Connop*, ante, p. 693. Also stat. 8 & 9 Vict. c. 109, ss. 15, and 18.

(b) November 27th, 1842. Before Lord Denman, C. J., Coleridge, and Wightman, J.

it stated, by way of inducement, that the plaintiff was a jobber in the funds, and complained that the defendant slandered the plaintiff as such jobber: and the court held that it did not sufficiently appear that the trade was legal. But here the declaration does not allege the betting; and the record shows no illegality, except from the defendants' imputation. So in *Hunt v. Bell*, 1 Bing. 1; S. C., 7 B. Moore, 212, the illegal occupation, to which the slander referred, was necessarily part of the plaintiff's case: so was the fact of the illegal trade in *Manning v. Clement*, 7 Bing. 362. In the case last mentioned, indeed, the illegality did not appear on the record: but the inducement stated that the plaintiff carried his trade on in an honest and lawful manner; and it was held that the defendant might disprove this, under a plea of not guilty, by showing that the trade was not legally carried on: and \*the judgment is carefully limited to this. But, according to the construction recently put on the new rules, it would rather seem that not guilty admits even the truth of such an inducement. (a) *Yrisarri v. Clement*, 3 Bing. 432, shows that, although a party cannot recover for words spoken of him in respect of his conduct in an illegal transaction, he may for words spoken of him in respect of a distinct matter arising out of such transaction: according to the principle which must be contended for on the other side, if a man be charged with cheating at dice, he cannot recover, because if he had played at dice it would have been illegal. Secondly, the question put on re-examination was proper. The objection is, that the inquiry pointed only to the opinion of the witness, which is a species of evidence admissible only on questions of science. But it was put in order to explain the answer given on cross-examination. That answer, unexplained, tended to show that, according to the understood rules of betting, the act imputed was not dishonourable: the question put on re-examination was directed precisely to this point, and tended to explain the former answer. And, further, the question was admissible as testing the witness's knowledge of the matter on which he had been cross-examined. [\*741]

Sir *W. W. Follett*, solicitor-general, *Edwin James* and *J. P. Taylor*, contra. First: the fact of the betting is essential to the plaintiff's complaint. If the alleged libel imputed only that the plaintiff had withdrawn a horse from the race, there could have been no ground \*of com- [\*742] plaint: the complaint is that he is charged with withdrawing a horse upon which he has betted. The criterion, therefore, suggested on the other side, is against the plaintiff: the matter to which the publication relates is thus not collateral to the illegal act, the publication being actionable only upon the assumption that the illegality has occurred. And this defence arises upon the plea of not guilty, because it shows that no libel has been published, inasmuch as the conduct of a man in an illegal transaction cannot be the subject of a libel, legally speaking. On the same,

(a) See *Taverne v. Little*, 5 New. Ca. 678; *Dunford v. Trattles*, 12 M. & W. 529; *Torrance v. Gibbins*, ante, p. 297.

principle, a privileged communication may be set up under this plea. Other illustrations are given in Jervis's New Rules.<sup>(a)</sup> A special plea would be improper. The plaintiff, on this issue, had to show what the defendants were charged with publishing: he could not do that without showing that he had engaged in betting, and therefore could not make out his right of action without himself insisting on the illegal act. This defence is not in the nature of a confession and avoidance, as a justification would be: it does not confess any right of action in the first instance. This distinction is explained in Stephen's Treatise on the Principles of Pleading, p. 229, &c., 5th ed. The illustration suggested on the other side is really against the plaintiff: if a party could not show that he was libelled without showing that he had gambled at dice, he could not recover. It would not be a libel to allege that plaintiff had cheated defendant in a smuggling transaction. The cases which have been mentioned are therefore in the defendants' favour even upon the explanation suggested. In *Hunt v. Bell*, 1 Bing. 1; S. C., 7 B. Moore, 212, the declaration \*showed no illegality: but it became necessary for the

\*743] plaintiff to call evidence which disclosed it. Here the plaintiff could not identify himself as the subject of the libel unless he showed the betting. The same principle runs through all the law. "No court," as Lord MANSFIELD said in *Holman v. Johnson*, 1 Cowp. 341, 343, "will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." The publisher of a libellous work cannot maintain an action for piracy of his work; *Stockdale v. Onwhyn*, 5 B. & C. 173. [Lord DENMAN, C. J., referred to *Stockdale v. Tarte*, 4 A. & E. 1016.] There the jury seem to have been allowed to take the truth into their consideration upon a plea of not guilty, because the truth was necessarily a part of the plaintiff's case. Cases of actions on contracts *prima facie* legal, as *Fenwick v. Laycock*, 1 Q. B. 414,<sup>(b)</sup> are inapplicable: the right there does not depend upon that which creates the illegality. It is urged that the publication is not the less a libel because it imputes illegal betting: but the jury were told by the lord chief baron that the imputation complained of was upon the plaintiff in his character of a better. Secondly, it is manifest that the only effect of the question complained of was to obtain the witness's personal opinion as to the nature of the imputation. That is not legitimate evidence. In *Campbell v. Rickards*, 5 B. & Ad. 840, it was held that, in an action relating to a policy of insurance, underwriters could not be asked whether certain information was, in their opinion, material or not. *Ramadge v. Ryan*, 9 Bing. 333, was an action by

\*744] a physician for a libel \*alleging that another physician had refused to act with the plaintiff; a justification was pleaded: and it was held that a medical witness could not be asked his opinion whether such other physician, in refusing to act with the plaintiff, had honourably dis-

(a) All the New Rules, &c., p. 131, note (c) 4th ed.

(b) See the observation of Parke, B., in *Daintree v. Hutchinson*. 10 M. & W. 85, 92.

charged his duty to the profession. If the evidence ought not to have been received, there must be a new trial, however slight the effect upon the verdict; *Wright v. Doe dem. Tatham*, 7 A. & E. 313, 330.

*Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

This was an action for a libel on the plaintiff, imputing that he had entered a horse to run for certain stakes at Epsom races, and had afterwards fraudulently withdrawn him for the purpose of obtaining an unfair advantage over other persons with whom he had laid wagers on the expected race. A justification was pleaded, but was negatived by the jury, who found a verdict for the plaintiff, with 300*l.* damages.

A rule nisi for a new trial was granted on two grounds.

First, that the plaintiff presented himself, by his evidence, as a person who had no right to sue in a court of justice for injury to his character. The objection to his right of suing, from being engaged in horseracing, appears on the record: but in truth it is wholly groundless. For, even if running a race without fraud were altogether prohibited by the law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters \*connected with the transaction (in support of which proposition numerous authorities were quoted :) but, moreover, the fact of engaging in a horserace is not in itself an illegal act. [\*745]

Another ground for a new trial was argued; an improper question, supposed to have been allowed in the examination of Lord John Fitzroy, an important witness for the plaintiff, who described the mode of proceeding by the Jockey Club in settling disputes between parties engaged on the turf.

It was objected that the question related to the view which, in the witness's opinion, ought to be taken of the moral character of certain regulations made by the Jockey Club, thus transferring to the witness the functions of the jury. But, when we look at the course of examination of that witness, we think that such was not the case. The libel declared on consisted in imputing to the plaintiff that he acted dishonourably in withdrawing a horse which had been entered for a race. It appeared in evidence that he was a member of the Jockey Club, and that according to their rules, those who may have entered their horses have the privilege of withdrawing them before the race is run. The witness had stated that disputes on such occasions are referred to the Jockey Club, who decide according to justice and equity. In his cross-examination he was asked whether the rules did not give power to a subscriber to withdraw his horse at his own pleasure without assigning any excuse, and from whatever motive, which he answered affirmatively. The learned counsel then asked whether in the opinion of the witness such a proceeding would be according to justice and equity, with the evident design of ascertaining whether the Jockey Club would be likely \*to sanction it with their approval, and whether a subscriber, acting from the [\*746]

fraudulent motive of winning wagers laid by him against his own horse, would be entitled to the award in his favour. The witness answered, that such conduct in his own opinion would be most dishonourable. And it followed, from his own account of their regulations, that a subscriber so acting would incur disgrace and reprobation, though the regulations, stated in general terms on cross-examination, and without the qualification, might have led to the contrary conclusion. We think this perfectly free from objection, and necessary for arriving at the real meaning of the evidence given. Rule discharged.

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**The QUEEN v. The Justices of the WEST RIDING.  
(SHEFFIELD v. CRICH.)**

Reported, ante, p. 10.

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**\*747] \*CARPUE v. The LONDON and BRIGHTON RAILWAY  
COMPANY.**

The London and Brighton Railway Company, by their act (7 W. 4, & 1 Vict. c. cxix.) were empowered to make the railway, which all persons were to have liberty of using with carriges, &c., on payment to the company of tolls regulated by the acts; the company were also empowered to provide locomotive engines on the railway and charge for the use of them, and to use locomotive engines and carriages for the conveyance of passengers, goods, &c., and to charge for such conveyance, in addition to the toll, within a limited amount. It was enacted that no action or proceeding should be prosecuted against any person or corporation *for any thing done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice in writing.*

**Declaration** in case against the company charged that they the owners of the railway, and of carriages used by them for the conveyance of passengers along it, for reward that, they being owners of the railway and carriages, plaintiff, at their request, became a passenger in one of the carriages, for reward to them, and they received him as such passenger; and it became their duty to use due care and skill in conveying him. **Breach:** that they did not use due care and skill in conveying him, but took so little care and so negligently and unskillfully conducted themselves in carrying him, and managing the carriage in which he was passenger, the train to which it was attached, and the engine whereby it was drawn upon the company's railway, that the carriage was thrown off the rails and plaintiff injured.

**Held,** that no notice of action was necessary, the company being sued in their capacity of carriers, and not for any thing done or omitted under the special authority of the act. Although, for the purpose of showing that the accident occurred from a speed which was improper under the circumstances, evidence was given that the rails were defective at the spot.

**Per Lord Denman, C. J., at nisi prius.** The plaintiff proved a *prima facie* case of negligence against defendants by showing that, when the accident occurred, the train and railway were exclusively under their management.

**CASE.** The declaration charged that the company, before and at the time of the committing, &c., were the owners and proprietors of a certain railway, to wit The London and Brighton Railway, and of certain car-

riages used by them for the carriage and conveyance of passengers, cattle, goods and chattels in, upon and along the said railway and certain other railways, to wit, The London and Greenwich Railway, and The London and Croydon Railway, from a certain place, to wit, London, to a certain other place, to wit, Brighton, and from Brighton aforesaid to London aforesaid, for hire and reward to them, the company, in that behalf; and, the company being owners and proprietors of the first mentioned railway and the said carriages, \*for the purpose aforesaid, plaintiff, heretofore and before the committing, &c., and before the commencement of this suit, to wit, 2d October, 1841, at the request of the company, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby on a certain journey, to wit, from London aforesaid to Brighton aforesaid, for certain reasonable reward to the company in that behalf, and the company then received plaintiff as such passenger aforesaid: and thereupon it became and was the duty of the company to use due and proper care and skill in and about the carrying and conveying plaintiff on the said journey: yet the company, not regarding their duty in that behalf, did not use due and proper care and skill in and about carrying and conveying plaintiff on his said journey, but took so little care, and negligently and unskilfully conducted themselves in and about carrying and conveying plaintiff on his said journey, and in conducting, managing and directing the carriage in which plaintiff was such passenger as aforesaid, and the train to which the same was attached, and the engines whereby the said train was drawn upon and along the company's said railway, that, by reason of such want of care and skill of the company, the carriage which contained plaintiff was then thrown and cast with great violence from and off the rails of the last mentioned railway, and was then overturned, crushed and broken to pieces, and thereby plaintiff was thrown out of the said carriage with great violence, and was grievously bruised, wounded and injured; and also, by means of the premises, plaintiff became and was sick, &c. (Various allegations of damage.)

\*Plea. Not guilty. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1842, it appeared that the accident happened when the plaintiff was being conveyed in one of the company's carriages. According to some evidence given for the plaintiff, the position of the rails had been somewhat deranged at the spot where the injury took place; and a witness expressed his opinion that the train must have been proceeding at a speed which, considering the state of the rails there, was hazardous. Evidence to meet this was given by the defendants. At the close of the plaintiff's case, the counsel for the defendants submitted that, under sect. 253 of stat. 7 W. 4, & 1 Vict. c. cxix.(a) (local and personal,

(a) "For making a railway from the London and Croydon railway to Brighton, with branches," &c.

- \*750] public,) by which the \*company is constituted, it was necessary to show that twenty days' notice in writing of the action had been given. No such proof being offered, the lord chief \*justice gave
- \*751] leave to move for a nonsuit. His lordship told the jury that they

Sect. 1 incorporates the company by the style of "The London and Brighton Railway Company."

Sect. 3, and subsequent sections, empower the company to make the railway, and give the ordinary powers of taking lands, &c.

Sect. 130 enacts "That if the said railway or any part thereof shall at any time hereafter be abandoned or given up by the said company, or, after the same shall have been completed, shall for the space of three years cease to be used or employed as a railway, then and in such case the lands so purchased or taken by the said company for the purposes of this act, or otherwise the parts thereof over which the said railway or any part of such railway which shall be so abandoned or given up by the said company shall pass, shall vest in the owners for the time being of the land adjoining that which shall be so abandoned or given up in manner following, that is to say, one moiety thereof in the owners of the land on the one side, and the remainder thereof in the owners of the land on the other side thereof."

Sect. 194 enacts "That all persons shall have free liberty to pass along and upon and to use and employ the said railway with carriages properly constructed, as by this act directed, upon payment only of such rates and tolls as shall be demanded by the said company, not exceeding the respective rates or tolls by this act authorized, and subject to the rules and regulations which shall from time to time be made by the said company or by the said directors by virtue of the powers to them respectively by this act granted."

Sects. 195 and 196 regulate the tolls which the company may demand for goods, passengers, &c., conveyed on the railway.

Sect. 197 enacts "That it shall be lawful for the said company and they are hereby empowered to provide locomotive engines and other power for the drawing or propelling of any articles, matters or things, persons, cattle, or animals, upon the said railway, and also upon and along any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said company shall think proper, in addition to the several other rates, tolls, or sums by this act authorized to be taken."

Sect. 198 enacts "That it shall be lawful for the said company, and they are hereby authorized to use locomotive engines and other moving power, and in carriages drawn or propelled thereby to convey upon the said railway and also upon any other railway communicating therewith all such passengers, cattle, and other animals, goods, wares, and merchandise, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges per mile for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this act authorized to be taken: provided always, that it shall not be lawful for the said company or for any person using the said railway to charge for the conveyance of any passenger upon the said railway any greater sum than the sum of three-pence half-penny per mile, including the rate or toll herein-before granted."

Sect. 253 enacts "That no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person or corporation for any thing done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities or any of the orders made, given, or directed in, by, or under this act, unless twenty days previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding to the other intended defendant, nor unless such action, suit, information, or other proceeding, shall be brought or commenced within six calendar months after the act committed, or in case there shall be a continuation of damage then within six calendar months next after the doing or committing such damage shall have ceased, nor unless such action, suit, or information shall be laid and brought in the county or place where the matter in dispute or cause of action shall arise."

must be satisfied that the accident had been brought about by the negligence of the defendants in the course of carrying the plaintiff upon the railway: and that, it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give. His lordship also adverted to the suggestion of the witness above mentioned, that the speed was too great for the state of the rails at the spot, as furnishing one hypothesis that might account for the event. Verdict for the plaintiff.

In Hilary term, 1843, Sir *W. W. Follett*, solicitor-general, obtained a rule nisi for a nonsuit on the ground of the want of notice, or for a new trial on the ground of misdirection in telling the jury that it lay on the defendants to disprove negligence, rather than on the plaintiff to prove it. (a)

In last term, (b)

Sir *F. Pollock*, attorney-general, *G. Hayes* and *Attree* showed cause. The 253d section of stat. 7 W. 4, & 1 Vict. c. cxix. applies only to things "done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities or any of the \*orders made, given, or directed in, by, or under this act." But the plaintiff here com- [\*752  
plains of carelessness and want of skill in carrying and conveying him. The company have no peculiar authority, by the act, except in what relates to constructing the railway: the carrying business belongs no more to them than to any other subject of the realm who, under sect. 194, may choose to employ the railway for the same purpose. That it suits the company better than any one else to become carriers, and therefore they have in fact become the only carriers, are circumstances not affecting their legal position as to this question. A part of the carrying from London to Brighton is performed, not on their own railway, but on the Greenwich railway: as to that part they clearly have no liability except as carriers; and the carrying cannot change its character afterwards. Suppose, in the case of a coach accident on a turnpike road, the coach proprietor were sued on the ground that the accident occurred from the coach having been driven too fast at a place where the road was out of order: would it be an answer that, if the commissioners of the road had been sued for the non-repair, they would have been entitled to notice? The case must be the same where the complaint is, as here, that the carrying business was not conducted properly with reference to the state of the railway. [WIGHTMAN, J. Sect. 197 authorizes the company to provide and charge for locomotive power; sect. 198 to carry, and charge for so doing.] That only gives the

(a) On the second day of the argument on showing cause, Thesiger, for the defendants, said that they wished for the opinion of the court on the point of notice only.

(b) January 12th and 13th, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

same rights, in this respect, as other subjects have. The company cannot be compelled to become carriers, though they may be compelled to complete and keep in repair the railway while used as such, and will incur liabilities by not doing so, even \*if there be no accident. But

\*753] they may abandon it, and then the land, by sect. 130, reverts to the owners on each side. Sect. 253, therefore, does not apply to the present charge. Assignees of a bankrupt are not protected, under sect. 44 of stat. 6 G. 4, c. 16, as to matters not done under the special powers conferred by the act; *Carruthers v. Payne*, 5 Bing. 270; *Edge v. Parker*, 8 B. & C. 697; *Worth v. Budd*, 2 B. & Ad. 172. So, where a local act (35 G. 3, c. 33, s. 221,) directed that notice of action should be given where persons were sued for any thing done under the act, this was held, in *Fletcher v. Greenwell*, 5 Tyrwh. 316; S. C., (not S. P.) 1 C., M. & R. 754, not to apply to cases of contracts by directors of the poor. *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749, is in point: there it was held that, under a similar clause, a railway company were not entitled to notice of an action brought against them for misfeasance as carriers. It is true that the damage there was to chattels, with respect to which carriers are insurers; whereas here the damage is to the person: but in each case the defendants are equally sued in the character of mere carriers: the only difference is that the negligence in one case is presumed, in the other must be proved. Here, if negligence in the character of carriers had not been established, the defendants would have succeeded under not guilty. PARKE, B., there said that the notice would be required, if the action were brought for not duly fencing the railway. But the complaint here refers to a duty which was not cast upon the defendants by the statute; and the subsequent language of PARKE, B., is applicable.

\*754] “The \*act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are.”

Sir W. W. Follett, solicitor-general, *Thesiger* and *Swann*, contra. Even in the capacity of carriers the company, being specially authorized to carry, by sect. 198, are entitled to notice of an action brought for negligence in carrying. [PATTESON, J. Sect. 253 speaks only of “any thing done or omitted to be done in pursuance of this act.” No part of the clause points to merely doing a thing negligently. If the company carry so carelessly as to mutilate their passengers, is that any thing done or omitted to be done in pursuance of the act?] That difficulty would have arisen equally in every case in which notice has been held necessary. In *Smith v. Shaw*, 10 B. & C. 277, a company (by stat. 50 G. 3, c. ccvii. local and personal, public,) had power to direct the mooring and unmooring of vessels in their dock: and an action brought for giving improper directions was held to be for a thing done in pursuance of the act, and to require notice under a similar clause to that now before the court. If no

other party had power to carry, beyond all doubt the carrying would be under the act. [COLERIDGE, J. It seems to me that, according to this part of your argument, every person carrying on the railway would be within sect. 253.] But, in fact, the defendants are charged, both by the declaration and by the course of evidence, as owners of the railway; and the lord chief justice so put it, in \*effect, to the jury. The declaration alleges that the defendants are such owners, that the plaintiff contracted with them as owners of the railway as well as of the carriages, and that the train was drawn along the railway: the state of the rails at the spot where the accident occurred was insisted upon in evidence: and the lord chief justice called the attention of the jury to it. [WIGHTMAN, J. That was with reference to the question whether the manner of carrying was adapted to the state of the railway.] The evidence pointed to negligence in not repairing the rails. The declaration is so framed as to make such evidence admissible; and that is enough to raise the necessity of notice. The case comes thus within the principle referred to by PARKE, B., in *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 766, where he says that, "if the action was brought against the railway company for the omission of some duty imposed upon them by the act, this notice would be required;" and instances an action for "neglect in not duly fencing the railway." [PATTESON, J. Then you must contend that the allegation of the contract to carry might be left out.] As to sect. 130, the question is not whether the company might not abandon the railway: while they keep it open under the act, they must keep it in repair, according to the principle laid down by TINDAL, C. J., in *The Lancaster Canal Company v. Parnaby*, 11 A. & E. 230, 243.(a) [\*755]

At the close of the argument in support of the rule, Sir F. Pollock, attorney-general, was permitted by the \*court to advert to some points raised in the argument for the defendants. He contended that the allegation as to ownership of the railway was immaterial, and might be struck out of the declaration; and that the charge was substantially against the defendants as carriers: that the evidence of the state of the railway was given, and adverted to by the lord chief justice, with reference only to the caution which it made necessary in conducting the train: and that sect. 253 was intended to protect the company in the exercise of their public duty, (as in *Wallace v. Smith*, 5 East, 115,) not in their private trade as carriers. Cur. adv. vult. [\*756]

LORD DENMAN, C. J., in this vacation, (February 9th,) delivered the judgment of the court.

The only question remaining for our decision is whether the defendants were entitled to a notice of action under sect. 253 of their act.

For the necessity of such notice it was argued that the declaration

(a) In Exch. Ch., affirming the judgment of Q. B. in *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223.

charged an injury done to the plaintiff by the company's omission to perform some of the works required by the act; and the dictum of PARKE, B., was cited, in *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 766. The notice was not thought, in that case, to be necessary: but the dictum asserts that, if an action were "founded on a neglect in not duly fencing the railway, on account of which the travelling was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the act, that case \*757] *would have* fallen within the 214th section. But, when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers;" for which the learned judge comments on the facts proved in that case.

In deference to that dictum leave was given, at the trial, to move for a nonsuit; and a rule to that effect was granted. It was largely discussed before us; but we are not now called on to consider how far the law laid down in that dictum is correct, because we think it clear in this case, as the learned baron did in that, that the injury has arisen from the defendants' misconduct as carriers, and not as proprietors; though, in considering the evidence, it is impossible to exclude some reference to the actual state of the railway.

Hence we think that there is no foundation for any argument in favour of the necessity of a notice; and that the plaintiff is entitled to retain his verdict.

Rule discharged.

\*758]

## \*PITCHER v. KING, Esq.

**Declaration**, in case against sheriff, recited a judgment recovered by plaintiff against B., and a fi. fa. thereon, delivered to defendant; and that goods of B. were within defendant's bailiwick, whereof defendant could have levied, of which he had notice: breach, that defendant had not the moneys before, &c., according to the exigency of the writ, nor paid them to plaintiff, nor levied the moneys, and falsely returned that he had seized goods of B., the value whereof was unknown to him, and which remained unsold for want of buyers.

**Plea**: that defendant seized a bed, &c., and divers other goods of B.; that plaintiff directed defendant to withdraw from the possession of all the goods except the bed, &c.; whereupon defendant did withdraw from possession of all the goods, except the bed, &c.; that he was unable to find buyers for the bed, &c.; and that the value of the bed, &c., was unknown to him: and the plea justified the breaches accordingly.

**Replication**, traversing the inability to find buyers, and new assigning that the action was brought, not for not levying of the goods from possession of which defendant withdrew, but, as well for not levying of the bed, &c., as also because, although there were goods of B., being part of those mentioned in the declaration and other than alleged in the plea to have been seized, of which defendant could have levied, whereof defendant had notice, yet defendant did not levy of the goods newly assigned, and falsely returned as in the declaration mentioned.

**Plaintiff** joined issue on the traverse, and demurred to the new assignment. On argument of the demurrer,

**Judgment** for plaintiff, for the badness of the plea, as it did not allege that the goods

seized were sufficient to satisfy the writ, or that there were no other goods which could be seized.

CASE. The last (third) count(a) alleged that plaintiff, heretofore, to wit 9th June, 1836, in the King's Bench, recovered a judgment against Humphrey Bean for a debt of 36*l.* 7*s.* 7*d.*, and 9*l.* 5*s.* for damages and costs, and plaintiff afterwards, to wit 11th July, 1836, sued out a fi. fa. directed to the sheriff of Sussex, commanding him that of the goods and chattels of H. B. he should cause to be levied the debt, &c., and have the moneys, when he should have so levied the same, before our lord the king, &c., immediately after the execution thereof, &c. ; which writ was endorsed to levy 23*l.* 17*s.*, and 1*l.* for that writ and warrant, besides poundage, &c., and was, to wit on the day and year last aforesaid, delivered to the now defendant, who then and from thence, &c., was sheriff of \*Sussex, [ \*759 to be executed, &c. ; and, although there were then, and for a long time afterwards and before the return by the now defendant made upon the writ as after mentioned, divers goods and chattels of H. B. within the bailiwick of defendant as sheriff as aforesaid, to wit at Brighton, &c., whereof defendant could and might and ought to have levied the moneys endorsed, whereof defendant had notice : yet defendant, not regarding the duty, &c., but contriving to injure plaintiff, &c., had not the moneys, or any part thereof, before our said lord the king, &c., according to the exigency of the writ and of the endorsement, nor hath he paid the same, or any part thereof, and he did not nor would, at any time before his return after mentioned, levy the moneys or any part thereof, but wholly neglected, &c. ; and afterwards, to wit 17th October, 1836, falsely and deceitfully returned to the said court of our said lord the king, at Westminster aforesaid, upon the writ, that by virtue of that writ he had seized and taken the goods and chattels of H. B., the value whereof was to him unknown, which goods and chattels remained with him unsold for want of buyers, and that therefore he could not have that money, to wit the moneys in the said writ and endorsement mentioned, before his said majesty at the day and place in the same writ mentioned, as the same writ commanded him : as by the same last mentioned writ, &c., more fully appears : by means of which plaintiff hath been and is greatly injured, &c., (averring that the moneys were still unpaid.)

Plea, (b) that, after the delivery of the fi. fa. to \*defendant, and before making the return, to wit 11th July, 1836, defendant did [ \*760 seize and take in execution, under the fi. fa., one bed, one bolster, two pillows and one table, of the goods and chattels of H. B., besides divers other goods and chattels of H. B., and which said bed, bolster, pillows and table, and which said other goods and chattels of the said H. B., were, at the time of the seizing and taking the same as aforesaid, found

(a) See the pleadings on the first two counts, *Pitcher v. King*, 9 A. & E. 288.

(b) The fourth on the record.

within defendant's bailiwick; and defendant then took and had, held and retained possession of, the same in execution, under the fi. fa, from the time of the seizing and taking the same in execution as aforesaid, and thenceforth continually, until afterwards and before the making of the return, to wit until and upon 20th July, 1836, when defendant withdrew as hereinbefore (a) mentioned from the possession of all of the said goods and chattels of the said H. B. so seized, &c., except the said bed, bolster, two pillows and table: that afterwards, and before the return, and whilst defendant held and retained possession of the said bed, bolster, two pillows and table, and of the said other goods and chattels of the said H. B., so seized, &c., to wit on 20th July, 1836, plaintiff commanded and directed defendant to withdraw from the possession of all of the goods and chattels of the said H. B., so seized, &c., save and except the said bed, the said bolster, the said two pillows and the said table: whereupon defendant did then, to wit upon the day and year last aforesaid, immediately, in obedience to the said command and in pursuance of the said direction of plaintiff, withdraw from possession of all the said goods and chattels of H. B.,  
 \*761] so seized, &c., save and except \*the said bed, bolster, two pillows and table. And, because defendant was always, from the time when he so withdrew from such possession as aforesaid, to wit, &c., until and at and after the time of making the return, to wit until and at and after the said 17th October, 1836, unable to find and procure any buyers thereof, the said bed, bolster, two pillows and table remained and continued all that time in the possession of the defendant, in execution, &c. That at the time of the making of the return, to wit upon, &c., the the said bed, bolster, two pillows and table, being of a value unknown to defendant, remained and were in the possession of defendant in execution, &c., for want of buyers; wherefore defendant, to wit on 17th October, 1836, did make the said return, as he lawfully, &c. Verification.

Replication. That defendant, from the time when he withdrew, &c., until the time of making the return, was not unable to find and procure any buyers of the said bed, &c., in manner and form, &c.: conclusion to the country. And plaintiff further says that he issued his writ in this suit, and in and by the said last count of said declaration in this suit complains, not for and because that defendant did not of the said goods and chattels from the possession of which the said defendant withdrew as in the plea mentioned before the return, levy the moneys, &c., but as well for and because that defendant did not of the said bed, bolster, two pillows and table in the plea mentioned, before the return, levy the moneys, &c., as also for and because that, although at the time when the writ was delivered to defendant, and afterwards and before the return, divers goods  
 \*762] and chattels of the said H. B., being part of those in the \*count mentioned, and being also other than those in the plea mentioned and therein alleged to have been seized and taken in execution, were

(a) Sic.

within the bailiwick of defendant, whereof defendant could and might and ought to have levied the moneys, &c., whereof defendant then had notice, yet that defendant, not regarding, &c., but contriving, &c., did not, nor would, at any time before his said return, levy of the said goods and chattels above newly assigned, to wit the said goods and chattels in this new assignment mentioned other than those in the plea mentioned, the moneys last aforesaid, or any part thereof; but wholly neglected, &c.; and afterwards, to wit on the day and year in the said last count in that behalf mentioned, falsely and deceitfully returned as in that count mentioned, in manner and form as plaintiff hath above thereof complained against defendant; which said grievance, above newly assigned, is a part of the said grievance in the count mentioned, other than and different from the part thereof in the plea mentioned and therein attempted to be justified. Wherefore, inasmuch as defendant hath not answered the said grievance above newly assigned, plaintiff prays judgment and his damages by him sustained on occasion of the same, &c.

Rejoinder. As to the traverse, similiter. As to the replication by way of new assignment, that the said new assignment is not sufficient in law.

Joinder in demurrer.

The case was argued in last term.(a)

\**Peacock* for the defendant. The third count is bad in itself; and the new assignment does not, with the count, contain a cause of action. The count appears to contain three charges: first, that the defendant had not the moneys in court according to the exigency of the writ; secondly, that he did not levy; thirdly, that he made a false return. The first shows no right of action. The defendant may have done his duty by seizing, and yet the goods may have remained in his hands for want of buyers. There should have been an allegation that the goods seized were sold and had produced the moneys, or that the defendant might have sold and did not. A levy and a seizure are different things: the levy is not made till the moneys are raised by sale of the goods seized.(b) The writ commands only that the sheriff shall cause to be levied, and have the moneys, when levied, in court. The same argument applies to the second charge. The third charge also is insufficient. The falsehood of the return is alleged generally: but the plaintiff should have shown in what the falsehood consisted, as in the case of an indictment for obtaining money under false pretences; *Rex v. Perrott*, 2 M. & S. 379. Then the defendant pleads specially, as he was obliged to do; *Wright v. Lainson*, 2 M. & W. 739; *Lewis v. Alcock*, 3 M. & W. 188: he shows that the plaintiff directed him to withdraw from the possession of part of the goods which he had seized, and that the remainder are in fact in his hands for want of buyers. To this the plaintiff now assigns that he sues,

(a) January 23d, 1844. Before Lord Denman, C. J., Patteson, Coleridge, and Wightman, Js.

(b) See *Drewe v. Lainson*, 11 A. & E. 529.

as well in respect of not levying of the goods mentioned in the plea, as also in respect \*of other goods whereof defendant might have  
 \*764] levied. But that is enlarging the declaration,(a) which charges no neglect in not levying of any particular goods. Nor is the sheriff liable for not seizing particular goods: his business is to levy as he can and thinks fit. Nor is it averred that the goods mentioned in the plea would not have satisfied the writ.

*Crompton*, contra. As to the count, considered by itself, there is no special demurrer to it; no objection, therefore, can be raised on the ground of multifariousness. There is substantially a good complaint. The count alleges that there were goods out of which the defendant might have levied; and that he did not levy. The form agrees with that in *Chitty on Pleading*.(b) The language of PARKE, B., in *Wright v. Lainson*, 2 M. & W. 739, 741, 742, shows that the allegation, that the defendant has not levied, sets forth a good cause of action. The same inference seems to result from the language of PATTESON, J., in *Wylie v. Birch*, 4 Q. B. 566, 576.(c) And, further, the false return is properly charged; for the inducement shows that the return of nulla bona was false, because there were goods out of which the levy might have been made. The rule as to an indictment for obtaining money under false pretences does not apply to civil pleading. The count, perhaps, contains more than is necessary: but, in substance, it complains of and shows a breach of duty. Next, either the plea is bad, or the new assignment good. The plaintiff,  
 \*765] according to the plea, has directed \*the defendant not to levy from certain articles. If those articles, together with the rest that was seized, covered the whole sum to be levied, or if they were all that could be seized, this might be an answer: but there is no such allegation. If the sheriff seizes, or can seize, enough to levy the whole debt, he is not discharged from levying by the creditor desiring him not to levy from one particular article. The plea does not show that the goods mentioned in the declaration, as being those from which the defendant might have levied, are comprehended among the goods mentioned in the plea. But, even if that can be implied, then the new assignment is good, for it explains that the plea, so understood, is not pleaded to the real cause of complaint. The case is then as if the plea had formally concluded with a *quæ est eadem*, which must be met, not by a traverse, but by a new assignment; *Heydon v. Thompson*, 1 A. & E. 210; *Wheeler v. Senior*, 7 M. & W. 562.

*Peacock* in reply. It was for the plaintiff to show that what the sheriff seized was insufficient. The defendant's duty arises simply upon his seizing enough; *Stubbs v. Lainson*, 1 M. & W. 728; S. C., Tyrwh. & G 1000. He pleads that he did seize some goods, which the plaintiff directed

(a) See note (g) to *Greene v. Jones*, 1 Wms. Saund. 800 i. (6th ed.)

(b) Vol. ii. p. 564, (7th ed.)

(c) See *Benson v. Welby*, 2 Saund. 153, 155.

him to abandon: he is not bound to show the value. And, after the new assignment, the plea cannot be objected to: the matter pleaded to is struck out of the declaration, and the plea with it. [PATTESON, J. It is not like a new assignment of *extra viam*: the new assignment treats the declaration as divisible, and puts aside a portion of it only. WIGHTMAN, J. The plaintiff says that you have \*not answered all his complaint. The complaint is not for omitting to seize specified goods. [\*766

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court. After reading the count and plea, his lordship proceeded as follows.

A new assignment was pleaded, avering that the plaintiff did not proceed for the defendant's not levying on the goods from which he so withdrew, but because he did not levy the debt of the goods so seized, and other goods, the property of the debtor, which the defendant might have seized. To this there was a demurrer, on which considerable discussion took place. But the plaintiff also objected to the validity of the plea: and we are of opinion that the objection must prevail.

The declaration is somewhat confused, and appears to involve several grievances. We hold it good as a complaint that the sheriff might have levied and neglected to do so.

The answer given by this plea is, that the plaintiff himself directed the defendant to withdraw from the possession of certain goods of the debtor which he had seized, and that certain other goods of the debtor, which he also seized, remain in his hands unsold for want of buyers. And both these propositions may be true, and the declaration also. There may have been goods of the debtor, of which the debt ought to have been made, notwithstanding this account of those which actually came to the sheriff's hands. To render these two propositions available as a defence, it was obviously incumbent on the defendant to show that they \*ac- [\*767  
counted for all the debtor's goods within the bailiwick, or that the goods seized were sufficient to satisfy the execution: for his duty was to possess himself of all, or so many as were sufficient.

Our judgment must therefore be for the plaintiff.

Judgment for plaintiff.

### DOE on the demise of JOHN EVANS v. RICHARD PAGE.

The Limitation Act, 3 & 4 W. 4, c. 27, s. 7, which (explaining sect. 2,) enacts that the right of action, where any person "shall be" in possession of land as tenant at will, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year from its commencement, does not apply where the tenancy at will has ceased before the passing of the statute. In such a case, the limitation runs from the time when the tenancy determines without the intervention of the act.

**EJECTMENT for messuages and lands in Worcestershire.**

On the trial, before WIGHTMAN, J., at the Worcestershire Spring assizes,

1843,(a) the following facts appeared, as detailed by Lord DENMAN, C. J., in giving judgment on the rule hereafter mentioned.

“The lessor of the plaintiff in this case claimed as heir at law of his father, who died in November, 1816. From the time of the death of the father, the mother of the lessor of the plaintiff continued in possession of the premises in question, as tenant at will to the lessor of the plaintiff, until her death in July, 1832. Upon the \*death of the mother,  
\*768] the defendant, having no title himself, took possession of the premises, and remained in possession until the ejectment was brought, not as agent to the lessor of the plaintiff, but adversely to him, as found by the jury.”

The learned judge directed a verdict for the plaintiff, giving leave to move for a verdict for the defendant, or a nonsuit. In Easter term, 1843, *R. V. Richards* obtained a rule nisi accordingly, or for a new trial. In the vacation after last Michaelmas term,(b)

*Godson* and *J. Gray* showed cause. The question is, whether the lessor of the plaintiff be barred by the operation of stat. 3 & 4 W. 4, c. 27. Sect. 2 alone clearly does not bar him. By that section, he had twenty years from his right first accruing; and, according to common law principles, his right first accrued upon the determination of the tenancy at will, which, as no notice was given, or other act done to put an end to the tenancy, was at the death of the tenant at will in 1832. The defendant, however, relies on the explanation furnished by sect. 7, which enacts that, “when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such  
\*769] tenancy, at which time such tenancy shall be \*deemed to have determined.” But the words “shall be” cannot refer to a tenancy which had expired before the act was passed: and the act passed on 24th July, 1833; but the tenant at will died in 1832. *Doe dem. Bennett v. Turner*, 7 M. & W. 226, will be relied on for the defendant. The view there taken by the Court of Exchequer was taken also in the Court of Exchequer Chamber; *Turner v. Doe dem. Bennett*, 9 M. & W. 643. But in that case a tenancy at will was in existence when the statute passed.

(a) The case had been previously tried before Coleridge, J., at the Worcestershire Spring assizes, 1841, when a verdict was found for the defendant. In Easter term, 1841, *Godson* obtained a rule nisi for a new trial. In Easter term (May 2d) 1842, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js., *R. V. Richards*, showed cause, and *Godson* and *E. Yardley* were heard in support of the rule. The court took time to consider: and, in Trinity term (June 9th) 1842, Lord Denman, C. J., delivered the judgment of the court, whereby the rule was made absolute in order that certain facts might be more fully investigated.

(b) December 9th, 1843. Before Lord Denman, C. J., Williams, and Wightman, Js. Coleridge, J., had left the court.

A tenancy at will commencing in 1817 had been determined in 1827 ; and it is true that the court appeared to assume that, if no tenancy at will had been created since, a right of action would have accrued in 1818, and the twenty years have begun to run from thence: the main questions, however, were, as to the determination of the will in 1827, and whether the fact of a subsequent tenancy had been properly inquired into. The attention of the court was not drawn to the date, with reference to the statute, of the first tenancy at will, which, in the event, became immaterial. The question might have been raised in *Doe dem. Stanway v. Rock*, 4 M. & G. 30: but there, as it turned out, no tenancy at will had existed within twenty years of the time of bringing the action. The construction contended for by the plaintiff would destroy rights existing at the time of passing the statute, as where a tenancy at will of more than twenty-one years' standing existed at that time.

*R. V. Richards* and *J. W. Smith*, contra. The language of PARKE, B., in delivering judgment in *Doe dem. \*Bennett v. Turner*, 7 M. & W. 234, is express. He says that, if there had been a continuous tenancy at will from 1817, or if no new tenancy at will had been created after its determination in 1827 (which would have been a case exactly similar to the present,) "the right to bring an action, which, by the express provision of the seventh section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period, would have been barred." The inquiry there into the second tenancy at will, which the court directed, was unnecessary upon the view for which the plaintiff here contends. Sect. 2, as explained by sect. 7, limits the right to recover to twenty years from either the determination of the tenancy at will, or the end of a year from its commencement, whichever may first occur. If this were not so, a tenancy at will would have less effect in barring the action than a tenancy from year to year under sect. 8. Sect. 15 was applied retrospectively in *Nepean v. Doe dem. Knight*, 2 M. & W. 894, and sect. 17 in *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63. In *Doe dem. Burgess v. Thompson*, 5 A. & E. 532, it was assumed that sect. 7 is retrospective ; otherwise it would not have been necessary to have recourse to sect. 15. The words in sect. 2, which is the substantive enactment, are retrospective, "shall have first accrued ;" and the language of the substantive enactment, though explained by a subsequent section, must be adhered to, as in *James v. Saller*, 3 New Ca. 544. [\*770]

*Cur. adv. vult.*

\*Lord DENMAN, C. J., now delivered the judgment of the court. After stating the facts (as in p. 767, ante,) his lordship proceeded as follows. [\*771]

The question is, whether the plaintiff's remedy is barred by the 7th section of stat. 3 & W. 4, c. 27.

The tenant at will died one year before the passing of that act: and, if

the act had *not* been passed, the lessor of the plaintiff would have been in time with his ejectment, as the period of adverse possession, or rather when his right accrued, would have been calculated from the death of the tenant at will in July, 1832, when the tenancy determined. But it was said that, by the 7th section of the statute, the right, where there is a tenancy at will, is to be deemed to have accrued, either at the determination of the tenancy or at the expiration of a year next after the commencement of the tenancy.

It may be that the effect of this section is to give a right of entry at the determination of the tenancy at will at any time within a year after its commencement; and, consequently, if that section be applicable to the present case, the lessor of the plaintiff is too late, as the tenancy at will of the mother commenced in 1816; and the right of the lessor of the plaintiff would accrue in 1817, more than twenty years before the ejectment was brought.

But we are of opinion that the 7th section only applies to cases of tenancies at will existing at the time the act passed, or subsequently; and that it does not apply to cases where the tenancy at will had been determined before the passing of the act.

The words of the 7th section are: when any person *shall be* in possession or in receipt of the profits of any \*land, or in receipt of any  
 \*772] rent, as tenant at will, the right of the person entitled subject thereto" "shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy." This section is in terms only applicable to the case of a future, or at most of an existing, tenancy at will, and not to the case of a tenancy at will which had been determined, and was not existing, when the act passed. A different construction, even if the words permitted it, would cause the greatest hardship: for a person, who, as the law stood before the passing of the act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights.

We are, therefore, of opinion that this rule should be discharged.

Rule discharged

**\*The Mayor, Aldermen, and Burgesses of EXETER v. [773  
WARREN.**

In an action by the corporation of Exeter, for petty customs and port duties, payable on goods landed at Teignmouth, the plaintiffs, to show the receipt of such dues in former times, produced a series of accounts purporting to be of the receipts by the receivers of the city. It was proved that the receivers' accounts were regularly audited, and that no one could (at the time to which the evidence related) be mayor till he had been receiver and had his accounts audited. Down to a certain time, the accounts were not signed at all; afterwards they were regularly signed by the auditors only. One entry of the latter class stated the receipt by B., a receiver, of a sum for town dues from W; and, with this entry, was found a paper stating that W. had received a sum for town dues, almost exactly corresponding with that stated in the entry, and at the time of which it bore date. No evidence was given as to the handwriting of the latter paper. B. and W. were both dead. The documents were more than thirty years old. No one of them stated the receipt to be "by me;" but the third person was used. *Held*, that all the documents were admissible evidence.

The crown is entitled (except where vested rights would be interfered with) to create a port for the landing of goods, and to assign its limits, though the soil be in a subject: and such creation is a good consideration for the receipt of petty customs and port dues throughout the port so assigned. And such petty customs and port dues might, in ancient times, be granted away by the crown.

The plaintiffs proved a grant of the town to them, by the crown, in fee farm; and it was not disputed that they were owners of a port of some extent, with some dues; they also proved the receipt, in fact, of the dues for goods landed at Teignmouth, and leases by them of such dues. *Held* to be evidence from which a jury might infer that the port extended to Teignmouth, and that the dues were payable to the plaintiffs for goods there landed; though Teignmouth is situate on a different river from Exeter, and the mouths of the rivers are several miles apart; and though no evidence was given of repairs or other services performed by the plaintiffs at Teignmouth, or of any right to the soil there, in themselves or the crown.

DEBT, charging defendant to be indebted to plaintiffs in a certain sum of money, to wit 5*l.*, "for certain petty customs, dues and duties then due and payable from the defendant to the plaintiffs, upon certain goods, wares and merchandise, to wit 100 chaldrons of culm; and in a certain other sum," &c., (charge in the same terms for fish, for oil, and for seal skins;) "all then respectively imported by the defendant into the port of Exeter, in the county of Devon, to wit at Teignmouth in the said port;" payable on request.

Plea, *nunquam indebitatus*. Issue thereon.

On the trial, before COLERIDGE, J., at the Devonshire \*Spring assizes, 1841, the landing of the goods was not disputed, but the question was merely as to the right of the plaintiffs to take the dues at Teignmouth. [774

The plaintiffs, among other documentary evidence, put in the following. A charter of Richard, king of the Romans and earl of Cornwall, dated 7th November, 1259, granting "quod majores, ballivi et cives nostri Exon., et eorum hæredes, in perpetuum habeant et teneant civitatem nostram Exon., ad feodi firmam, pro antiquâ et debitâ firmâ, &c. A charter of 6th February, 6 Ed. 3, reciting that the before-mentioned grant was set aside

by a judgment of the Court of Exchequer, and the city seized into the hands of the crown, and granting “quod prædicti major et cives habeant et teneant civitatem prædictam, cum pertinentiis, sibi, hæredibus et successoribus suis, de nobis et hæredibus nostris, ad feodi firmam, cum omnibus ad firmam illam pertinenbitus, reddendo indè nobis et hæredibus per annum, ad scaccarium nostrum, viginti libras,” &c., “in perpetuum, et sustinendo alia onera eidem firmæ priùs incumbentia,” &c.

Evidence was also given to show the receipt of the dues, in fact, for goods landed at Teignmouth. It was proved that the receiver's accounts were regularly audited, and that, in the ancient state of the corporation, no one could be mayor till he had served the office of receiver and had had his accounts audited. From the muniments of the corporation were produced a series of accounts purporting to be the audited accounts of the receivers. None of these were signed by the receiver: from the reign of Elizabeth downwards, but not earlier, they appeared to be signed by the auditors. These signatures were in different handwritings, and had the

\*775] appearance of originals. One of the latter, of the date \*of 4 Eliz., commenced as follows. “Civitas Exon. Compotus Johannis Dyer, senioris, Receptoris civitatis prædictæ ac collectoris omnium bonorum, reddituum et tenementorum ejusdem civitatis, necnon manerii de Durywarde Awlyscombe and Exilond, habitus, auditus et terminatus secundo die Septembris, anno,” &c., “coram Waltero Staplehyll,” &c., “auditores (a) hujus compoti audiendum et terminandum assignatos, a festo,” &c., “usque idem festum,” &c., “anno,” &c. It contained the following passages. “Et de 9*l.* 9*s.* 4*d.*, receptis de custumis marcandis arum hoc anno applicatarum apud Toppisham, Exmouth, (a) Cockewode, Dawlysshe, Kenton, Powdesham, Teyngmouth, Exmouth, (a) ac alibi infra portum de Exmouth et Exeter.” “Et sic communitati debet 36*l.* 19*s.* 8*d.*,” “quæ solvit auditoribus,” &c. The signatures were in the names of the auditors named in the body of the account. There was also, among the audited accounts, the account of Jonathan Burnett, receiver, from Michaelmas 1785 to Michaelmas 1786. In this, Burnett was debited with the following item. “Messrs. James Cornish and Widger, for the town duty by them collected at Teignmouth, 24*l.* 16*s.* 3*d.*” Together with this account were three loose papers. The first was a receipt, dated June 15th, 1786, in the handwriting of a deceased clerk of Burnett, for dues received from a brother of Cornish (who had then lately died:) this was written at the foot of an account headed “Teignmouth, port of Exon. An account of town duties from October, 1783, to October, 1785;” and which amounted to 9*l.* 17*s.* The second paper was headed as follows. “Teignmouth. An account of town duties received by Thomas Widger, due in 1784 and  
\*776] 1785, \*and unpaid to the late Mr. Cornish;” the amount being 6*l.* 7*s.* 8*d.* The third was headed “Teignmouth. An account of town duties received by T. Widger from Michaelmas 1785;” the

amount being 8*l.* 11*s.* 9*d.* The handwriting of the last two was not identified. Burnett and Widger were both dead. The defendant's counsel objected to the admissibility of each of the last two papers, and also generally to the admissibility of the receivers' accounts:(a) but the learned judge received the evidence.

A lease was put in, dated 18th September, 35 Eliz., whereby the mayor, bailiffs and commonalty of the city of Exeter demised to Nicholas Spicer, for seventeen years, at the annual rent of 20*l.*, "all that their fearine or custome commonly called the towne custome, due and belonging to the said mayor, bailiffs and comynaltie, for the entrie of all manner of shippes, barks, boates and vessells, whatsoever, arrivinge within the porte or haven of the cittie of Exeter, that is to wytte, Exemouthe, Cockwode, Kenton, Colepole, Powderham, Lymson, Tyngmouthe, Dawlishe, and all and everie other creeke and creekes reputed, taken or known to be parcell and member of the said porte, and laden with any wares, goods and merchandizes whatsoever; and also the towne custome due to the said mayor, bayliffes and comynaltie, for and of all manner of wares and merchandizes whatsoever, laden and broughte in any shippes, barks, boates or any other vessells, to be layd on land in any place or places, creeke or creekes, within the said haven, or in any part or member thereof; and also all manner of forfeitures," &c. Payment of the rent reserved in this case lease was shown. Another lease was also put in, of the date of 8 Ja. 1., whereby also the corporation similarly demised the town custom, and which mentioned Teignmouth in the same way. [•777]

There were also put in a royal commission and the return thereto. The commission was dated 15th September, 28 C. 2, and was directed to the mayors of Exeter, Dartmouth, Barnstaple and Bideford, certain officers of the customs, and others. It recited stat. 13 & 14 C. 2, c. 11, s. 14, and authorized the commissioners, or any three, &c., "to repair unto our said city and port of Exon., and to search, find out and survey the open places there and thereabouts; and to assign and appoint all such and so many open place or places to be places, quays, or wharves, for the landing or discharging, lading or shipping, of any goods, wares or merchandise, within our said port of Exon., as according to your good discretions, or the discretions of any three," &c., "shall seem most convenient and fit for the uses and services aforesaid; and to set down, appoint and settle the extents, bounds and limits of the said port, and of all such places, quays or wharves, by sufficient metes, limits and bounds, and utterly to prohibit, disannul, make void, determine and debar all other places within the said port from the privilege, right and benefit of a place, quay or wharf for the landing or discharging, lading or shipping, of any goods or merchandise as aforesaid, except respectively the goods and merchandises before excepted," &c. The return, enrolled in the Exchequer in Easter term, 29

(a) See post, note (c.) p. 785.

C. 2, stated that the commissioners had repaired “unto the said city and port of Exon.,” and had surveyed, &c., the open places there and thereabouts: “and, by virtue of the said commission, we do hereby set down, appoint and settle the extents, bounds and limits of the said port to be as followeth: viz. from the southernmost point of \*land on the east  
 \*778] side of the mouth of the river Axe, being the furthestmost extent eastward of the county of Devon, in a supposed right line to the southernmost point of land on the west side of the haven of Teignmouth, with all the channels, roads, streams, rivers, barra, havens and creeks, unto the quay commonly called the quay of Exon.,” &c.: the return then appointed certain quays for landing, &c.

Exeter lies upon the river Exe, which falls into the English channel on the coast of Devonshire, about six miles from the mouth of the river Teign. From the mouth of the Exe to that of the Teign the coast runs nearly in a line from north-east to south-west. Teignmouth is on the left (north-east) bank of the Teign. Topsham is on the Exe, between its mouth and Exeter.

Parol evidence was given of payment of the dues at Teignmouth to the plaintiffs, from 1806 to 1834, when payment was refused; and since then there had been no payment.(a)

No evidence was given for the defendant: but his counsel contended that the dues could not be taken without a consideration; and that no consideration was shown, there being no pretence that the soil at Teignmouth had ever belonged to the crown or the plaintiffs, and it not appearing that any repairs had ever been performed at Teignmouth by the plaintiffs. It was not, however, disputed that the port of Exeter existed, and that within some limits or other the plaintiffs must be entitled to some dues.

The learned judge told the jury that, in the early times to which the  
 \*779] existence of the port was referred, \*and indeed at all times, the prerogative of creating a port was in the crown; and that, where there were no anterior rights vested in any person, the crown would have a right to fix the limits of the port; that, where it had created a port and fixed the limits, it could grant the port duties and the right to load and unload there: and that there might be many considerations for the dues besides right of soil; as the privilege of landing customable goods. The jury found for the plaintiffs, except as to the sums charged for fish.

In Easter Term, 1842, *Crowder* obtained a rule nisi for a new trial, on the ground of the admission of improper evidence, of misdirection, and of the verdict being against the weight of evidence. In last Trinity term,(b)

(a) It is not thought necessary to state in this report any evidence besides that noticed in the argument and judgment.

(b) May 29th and June 5th, 1843. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

*Erle, Rogers, and Montague Smith* showed cause. The accounts were properly received in evidence. Burnett debits himself with the receipt of a sum from Cornish and Widger. Then with the paper by which Burnett does this, are found accounts by which Widger debits himself in two sums; and these, together with a sum which the receiver's clerk charges himself with receiving from Cornish, coincide, within two pence, with the sum for which Burnett debits himself. These are all accounts more than thirty years old, by which deceased parties debit themselves. They must be taken to be in the handwriting of the parties by whom they purport to have been written; *Wynne v. Tyrnwhitt*, 4 B. & Ald. 376; (a) *Doe dem. Webber v. Thynne*, 10 East, 206; note (8) to 1 Selw. \*N. P. 540, 10th ed. (Debt, III, 1.) The want of Widger's signature is unimportant; accounts are frequently received without [\*780 such signature. [COLERIDGE, J. Ancient receivers' accounts are seldom signed by the receivers.] In *Doe dem. The Earl of Egremont v. Date*, 3 Q. B. 609, the accounts were not signed; but no objection was taken on that ground. The accounts of both Burnett and Widger are found in their proper place; and the principle of *Bullen v. Michel*, 2 Price 399, applies. Burnett's account, being audited, must be presumed, in default of evidence to the contrary, to be the account handed in by himself to the auditors; and Widger's accounts, being found with it, and containing the word "received," are presumably the accounts made out by Widger to Burnett, and referred to by the latter as his vouchers at the audit. Widger's account is therefore admissible on the ground that Widger charges himself; but, even if that were not so, it is admissible as an account recognised by Burnett, by which recognition Burnett discharges Widger and charges himself. In *De Rutzen v. Farr*, 4 A. & E. 53, the accounts of rent received were not (as the court understood the facts) in any way connected with the steward; they purported to state receipts by a clerk of the steward; but no recognition by the steward, or proof of the clerk's employment, was given; and therefore the evidence was held inadmissible on a principle which does not apply to this case. Here it is as if Burnett had been alive, and had sworn that he had received the sum, with Widger's account, from Widger. The case closely resembles *Stead v. Heaton*, 4 T. R. 669. The accounts, \*being admissible for one purpose, are admissible for all; *Higham v. Ridgway*, 10 East, [\*781 109; *Davies v. Humphreys*, 6 M. & W. 153.

There was no misdirection. The crown has the power of creating a port; and the power of fixing the limits is necessarily included: though this, of course, is subject to the limitation pointed out by the learned judge; namely that, where private rights have grown up, the grant must not derogate from such rights. *Wilkes v. Kirby*, 2 Lutw. 1519, has been cited to show that a corporation can have dues only upon consideration,

(a) See *Doe dem. Thomas v. Beynon*, 13 A. & E. 431.

as of repair, &c.: but there the defendant had chosen to allege that the owners of the port received toll and custom “*erga necessarē emendas reparacōn et manutencon ejusdem portus per ipsos fiend* ;” and the question was whether, if a consideration were alleged, that was sufficiently alleged. And POWELL, J., said that the king may have a port and toll without any consideration, and that he who has a port is bound to repair it or else may be indicted. TREBY, J., said that, when the case of *Warren v. Prideaux*, 1 Mod. 104, was in debate, it was held that the owner of a port may have toll by prescription, without alleging any consideration. The obligation therefore may exist in the owner, as a *quid pro quo*: but performance of the repair is not a condition precedent to the right to take dues. In *Mayor of London v. Hunt*, 3 Lev. 37, it was held that the mere liberty of bringing goods into a port implied a consideration in itself. The right of soil is not essential to this right; and therein it differs from a right to take tolls in respect of bringing goods upon a manor, which was the claim in *Crispe v. Belwood*, 3 Lev. 424. In *Mayor of \*Exeter* \*782] *v. Trimlet*, 2 Wils. 95, a count in *assumpsit* alleged a prescriptive right to petty customs; and this was held good on general demurrer, though it was argued that consideration ought to have been shown. The note to that case refers to *Mayor of Yarmouth v. Eaton*, 3 Burr, 1402, where the corporation of Yarmouth recovered for tolls upon the export from the port of Yarmouth, though it was objected, on special demurrer, that no consideration was shown. Lord MANSFIELD said that ownership of the soil was out of the question: but that the making of the port was itself a sufficient consideration: and the case was distinguished from that of a toll thorough. The cases which may appear to make against the plaintiffs will generally be found to be cases of tolls thorough, as *Mayor of Nottingham v. Lambert*, cited 3 Burr, 1404, 1407; *Lord Pelham v. Pickersgill*, 1 T. R. 660; *Truman v. Walgham*, 2 Wils. 296; *Heddey v. Welhouse*, Moore, 474, was the case of a fair. In *Jenkins v. Harvey*, 1 C., M. & R. 877, 2 C., M. & R. 393, 404; S. C., 5 Tyrwh. 326, 871,(a) it was held that a claim for port duties was not against common right, and might originate in a modern grant from the crown. These duties are early recognised in the law. By 9 H. 3, (Magna Charta) c. 30, merchants are to come into England, to buy and sell, “*per antiquas et rectas consuetudines*.” One of the articles to be inquired of in Eyre was “*de novis consuetudinibus levatis in regno, sive in terrā, sive in aquā, et quis eas levaverit et ubi* ;” Hale de Port. M. Hargrave’s Law Tracts, 78; Bract. 117 a: and among the *Capitula Placitorum Coronæ Regis*, in the time of Richard I., in Wilkin’s *Leges Anglo-Saxonice*, (p. 351,) \*783] \*is the following: “*De custodiis portuum maris; si quid receperunt quod non reddiderunt* ;” &c. In the *Case of Customs, Subsidies, and Impositions*, 12 Rep. 33, and in *Rex v. Bates*, 2 How. St.

(a) See *Brune v. Thompson*, 4 Q. B. 543, 552.

Tr. 371 ; S. C., Lane, 22, and in the discussions which ensued, (a) the dispute was as to the right of the crown to impose new duties : but that ancient customs belonged to the crown was assumed. If so, the crown might grant these dues to the plaintiffs. Madox has given an account of a case of *The Corporation of Southampton v. Scurlag*, Madox's Firma Burgi, 220, ch. 10, s. 29, in which a dispute arose whether the corporation of Southampton, as the crown's grantees, at fee farm, of the port of Southampton, were entitled to take customs at Lymington ; and issue was joined on the question whether Lymington was within the bounds of the port of Southampton, and found for the plaintiffs. Petty customs were clearly due to the crown in ancient times ; as appears from Lord HALE's treatise *Concerning the Customs*, (b) though the imposition of fresh duties was recited to be illegal by stat. 12 C. 2, c. 4, s. 6, Lord HALE, ch. 4, p. 132, distinguishes between what are strictly customs, and duties (also called customs) belonging by prescription to the lord of the port ; and he mentions, ch. 4, p. 139, the customs of Exeter as an instance of the latter ; and it should seem that the smaller customs originally granted away by the crown sometimes remained in the hands of the grantees, while other larger customs to which the crown afterwards became entitled were retained by the crown. Then the only question must be as to the limits of the port. That must be a matter of evidence from usage, where no grant can be found confining the limits. That the crown can create a port is not disputed : and indeed Lord KENYON, in *Ball v. Herbert*, 3 T. R. 253, 261, when he was deciding against the right of towing on navigable rivers, expressly admitted this. But then it necessarily follows that the crown must assign the limits. The only question therefore remaining is, whether the jury, on the evidence, were warranted in finding that the crown granted the port with the customs claimed to the plaintiffs, and that the port included Teignmouth. (The argument as to the weight of evidence is omitted.)

*Crowder, J. Greenwood and Butt*, contra. The accounts of Widger were not so connected with the account of Burnett as to bear the character of an admission by either Burnett or Widger. The ground upon which evidence of this sort is received is that it would constitute evidence against the party making the entry, if he were alive. But, if a claim had been made against Widger, it would not have been supported by proof that a paper stating a receipt by him, but not traced to him, nor even running in his name, had been found among Burnett's accounts. Nor could Burnett be made liable by the fact that a paper was found among his accounts, alleging a receipt by Widger. [COLERIDGE, J. Suppose parol evidence were given that the vouchers for a particular series of accounts were kept

(a) See them collected in 2 Howell's State Trials ; also Hargrave's note there (p. 371,) reprinted from the folio, with additions.

(b) Harg. L. Tracts, 115, &c. ; see particularly ch. 4, p. 131.

in some place apart from the accounts: would not the documents found in  
 \*785] such a place be admissible wherever the accounts themselves could be made evidence? WILLIAMS, J. Or suppose some mere flying sheets were found any where in the custody of the corporation, corresponding in amount to the items mentioned in the accounts: would not they be admissible as connected with the accounts?] The coincidence in the sums, here, is not exact. In *Wynne v. Tyrwhitt*, 4 B. & Ald. 376, (referred to in 1 Phil. Ev. 298, 9th ed., (a) the accounts admitted were those of the actual steward of the manor: that shows only that Burnett's own account is admissible, which is not now disputed. (b) In *Doe dem. Webber v. Thynne*, 10 East, 206, it was considered that the words "solvit residuum mihi," and "solvit per me," in books containing receipts of rent, and forming part of the muniments of the dean and chapter of Exeter, furnished ground for inferring that they were accounts of a receiver debiting himself: that again is an authority only for the admissibility of Burnett's own accounts. What is called Widger's account does not, on the face of it, purport to be a voucher. Widger does not appear to charge himself by it; for it is not shown that he was a party to it at all: it might have been merely a memorandum of a  
 \*786] third person. In *De Rutzen v. Farr*, 4 A. & E. 53, 56, the accounts were held inadmissible "because they do not purport to charge the person whose signature they bear. In *Doe dem. Gollop v. Vowles*, 1 Moo. & R. 261, it was attempted to show that work had been done for a party, by a receipted bill charging him with the work, and found among his papers: but LITTLEDALE, J., refused the evidence, saying: "The cases have gone quite far enough. There would be no limit, if such a paper as this were admitted."

The direction to the jury cannot be supported. The claim is put on two grounds: as a claim of port duties and a claim of petty customs. No evidence was given that the land had ever been the property of either the crown or the corporation. No repairs were shown. If the corporation claim as grantees of petty customs, the answer is that the crown, if entitled to these customs, could not grant them away, any more than the great customs. But the common law right of the crown to any customs is not clear: it is doubted in *Sheppard v. Gosnold*, Vaughan, 159, 161, 163,

(a) See 1 Stark. Ev. 359, (3d ed.)

(b) On moving for the rule, (April 20th, 1842, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.,) it was urged that, as the documents produced as the accounts of Dyer and Burnett were not shown to be signed by them or to be in their handwriting, and did not use the words "I" or "me," so as to purport to be written by them, the evidence ought to have been rejected; but the court granted no rule on this point; Lord Denman, C. J., saying that there was no reason to suppose them merely copies; and that the most natural explanation of the documents being found where they were was that the accounts had been handed in to the auditors by the receivers. Coleridge, J., said that accounts were seldom signed by the receivers.

though a different view is taken in *Le Case de customes payable pur merchandises*, Davys, 8—10. It seems that the claim of petty customs originated in a demand made upon merchant strangers, and, strictly speaking, could be levied from them only. In *Sheppard v. Gosnold*, Vaughan, 170, it is pointed out that no stress can be laid upon a usage of paying duties contrary to law, inasmuch as men “will rather pay a little wrongfully, than free themselves from it over-chargeably.” In Lord COKE’s comment on sect. 30 of Magna Charta (referred to on behalf of the plaintiffs) he expresses a clear opinion that customs are due to the crown by statute only; 2 Inst. 58, 59. Lord HALE, \*in his treatise Concerning [\*787 the Customs, Harg. L. T. 147, has shown that the great customs were by statute only: and there is no principle which justifies resting the claim of petty customs on any other ground. The statutable nature of the duty seems to be assumed by Henry, History of Great Britain, vol. iv. p. 229, 230. The authorities cited in Hakewill’s argument in the House of Commons(a) show at least that no new custom could be imposed without the authority of parliament. And all customs, if lawful, must be presumed to be imposed for the public good; from which it follows that they cannot be demised or granted to any subject; *Case of Customs, Subsidies, and Impositions*, 12 Rep. 33, 34. It must be admitted that the language of the report there is rather favourable to the crown’s claim to impose duties, as upheld in *Rex v. Bates*, 2 How. St. Tr. 371. But here (as is pointed out in the passage cited by Mr. Fraser, note (A.) to 12 Rep. 34, from Hargrave, 2 How. St. Tr. 331) Lord COKE wrote inaccurately, and was not consistent with his opinion more deliberately expressed elsewhere. Mr. Hargrave, in his Preface to *Rex v. Bates*, 2 How. St. Tr. 371, has clearly shown that the crown has no right to impose duties; and he says, p. 377: “with respect to the particular claim of a prerogative to tax at the ports, it was more than liable to the general objections of being a prerogative taxation; because there was the addition of peculiar arguments against yielding to such a precedent. It was this very species of regal impositions, which gave occasion to some of the ancient statutes declaratory of the illegality of taxing without the consent of parliament; \*as [\*788 will appear by reading the incomparable speeches against impositions at the ports, by those profound constitutional lawyers Yelverton and Hakewill.” [COLERIDGE, J. These were arguments against the imposition of duties confessedly new. Do you contend that all petty customs are void for which no act of parliament can be shown?] The principle may at least be laid down to the extent of disallowing any claim of the crown to create a port and impose a duty upon goods landed at any named part of the coast, however remote. Hakewill, 2 How. St. Tr. 474, notices the argument that the port and haven towns belong to the king, and in regard thereof he may open and shut them on what conditions he pleases: and he says that the gates of cities and towns, and all streets and highways,

(a) Printed at the end of *Rex v. Bates*, 2 How St. Tr. 407. See pp. 460, 1, 2.

are also the king's, but it does not follow that the king can impose a duty on all persons passing through; and that the subject ought as freely to enjoy passage at the ports as the air on the water. Lord HALE, in the treatise *Concerning the Customs*, Harg. L. T. 132, says that "customs by prescription belonging to ports, were various according as the usage and custom was;" and after other instances, he says, p. 138: "I shall only add the petit customs of Exeter, which they claimed as parcel of their fee-farm, by grant made by King E. 3, unto them of the port of Exeter, *cum membris*, and the ferry of Exmouth, and lastage and stallage of the said ferry, as they were decreed unto them by default in a suit between the bailiff and commonalty of Exeter and one Wade." He then abstracts the case, which is of Hil. 14 C. 2. The account of the Charter of Edward III. given in the record referred to by him seems not to be correct. Afterwards he \*suggests p. 139, that, in the in-  
 \*789] fancy of customs, certain customs only were paid, which grew into a fixed duty, and, being inconsiderable, were granted away, though greater customs, afterwards granted, were always kept in the hands of the crown. This is contrary to principle: the magnitude of the custom cannot affect the right to grant away. [COLERIDGE, J. Can we set that right now?] In *Mayor of Exeter v. Trimlet*, 1 Wils. 95, no notice appears to have been taken of the language used by Lord HARDWICKE in an *Anonymous Case*, 2 Ves. Sen. 620, where the corporation of Exeter claimed petty customs: he there adverted to the doubt whether the crown could have petty customs otherwise than by act of parliament, and pointed out that, if an act of parliament was necessary, a subject could not claim by prescription, but must show a grant. A grant requires a consideration. [COLERIDGE, J. For the grant, not for the original right. What became of the action which was the subject of the *Anonymous Case*, 2 Ves. Sen. 620?] That has not been discovered.<sup>(a)</sup> It is not, however, now questioned that a petty custom might be payable: but the defendant denies that it can be payable at Teignmouth as due to a subject in respect of Exeter.

Then, next, the claim cannot be sustained as for a port duty. A port duty is payable only in respect of a port, in the confined sense of the word, that is, of "a harbour; a safe station for ships;" Johnson's Dict. sub voc. Port. A custom-house district, defined for fiscal purposes, has nothing to do with that species of port which earns port duties. "A port  
 \*790] is a harbour and \*safe arrival for ships, boats, and ballengers of burden, to fraught and unfraught them at;" Callis on Sewers, 57. HALE, *De Portibus Maris*, gives the definition in the larger sense which is here inapplicable. He says, Harg. L. T. 46, "A port is a haven, and somewhat more:" and he remarks that it "includes more than the bare place where the ships unlade, and sometimes extends many miles;" and after-

(a) The corporation recovered in two actions, in the year 1757, against parties who, from an entry in the act book of the corporation, dated 1754, appear to have probably been the parties obtaining the injunction in 1755: the injunction, therefore, seems to have been dissolved.

wards, p. 47: "Creeks of ports, are by a kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of, or dependent upon, other ports. And it began thus. The king could not conveniently have a customer and comptroller in every port or haven. But these custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that where these custom-officers were placed." But afterwards, p. 76, he speaks "touching the interest of propriety and franchise in the very port, viz. that part of the sea wherein ships come to unlade their goods." So Molloy says: "in regard that the port of London is of great concern in relation to the customs, the extent and limits of the same port is by the Exchequer settled, which is declared to extend and be accounted," &c.; and he lays down the limits, the eastern boundary being from the North Foreland on the sea coast of Kent to the Nase on the sea coast of Essex; De Jure Maritimo, vol. ii. p. 187, B. II., c. 14, s. 10, 10th ed. Stat. 20 G. 2, c. 18, was passed "for the better preservation and improvement of the river Wear, and port and haven of Sunderland:" yet Molloy calls Sunderland a member \*of the port of Newcastle-upon-Tyne; De J. Mar. vol. ii. p. 182, B. II., c. 14, s. 9. Stat. 4 G. 2, c. 19, was passed [\*791 for repairing, &c., the pier "and harbour of Ilfordcombe:" yet HALE names Ilfracombe as a member of the port of Barnstaple; De Port. M. Harg. L. T 48: Molloy as a member of the port of Exeter; De J. Mar. vol. ii. p. 185, B. II., c. 14, s. 9: and Beawes as a member of the port of Plymouth; Lex Mercatoria, vol. i. p. 248, 6th (Chitty's) edition. Teignmouth itself is called a port in stat. 23 H. 8, c. 8, s. 1; and so is Dartmouth; yet Beawes (Lex Merc. vol. i. p. 248, 6th (Chitty's) edition) and Molloy (De J. Mar. vol. ii. p. 185, B. II., c. 14, s. 9,) make Dartmouth a member of the port of Exeter. From a record cited by HALE (De Port. M. p. 55, 56) it appears that Topsham was a port belonging to the countess of Devon in the reign of Edward I., and distinct from the port of Exeter, which therefore cannot include Topsham by prescription: but Topsham lies between Exeter and the mouth of the Exe. These instances show the importance of distinguishing between the different uses of the word "port." On that distinction was founded the decision in *The Dock Company at Kingston-upon-Hull v. Browne*, 2 B. & Ad. 43. There a statute (14 G. 3, c. 56, s. 42,) gave the plaintiffs a right to duties upon vessels unloading, &c., within the "port" of Kingston-upon-Hull. Lord TENTERDEN, in delivering the judgment of the court, said that there were "two distinct senses in which the phrase, the port of Hull, is used,—namely, one as the head port of a district wherein there were subordinate and dependent ports; and the other the limited (and this also the popular) sense, of a port situate locally on a certain river or part of a river with a town near \*thereto." He then pointed out [\*792 that the rate in question was imposed as a remuneration for the

expense of excavating, &c., at Kingston-upon-Hull; and it is worth remarking that he considered that instances of acquiescence by ship owners might be referred to unwillingness to incur an expensive contest with a corporation. The court finally decided that the word "port" was there to be construed in its popular sense. The whole of this applies equally to port duties.

Three legal origins only can be assigned to port duties. They may be imposed where the land belongs to the crown, where it belongs to the grantee, or where duties are performed by the party claiming the dues. They do not lie in prescription: they may, if properly founded, be granted at this day. That was held by the Court of Exchequer in *Jenkins v. Harvey*, 1 C., M. & R. 877, 2 C. M., & R. 393, 404; S. C., 5 Tyrwh. 326, 871, where the court relied upon the ownership of land and performance of repairs as a consideration. Here, ownership of the land at Teignmouth, or performance of any duties there, was not even asserted. Lord HALE (De Portibus, Harg. L. T. 73) says that the ownership of the franchise and the ownership of soil may be distinct; and that the crown cannot generally give the right of using the soil for a port where it is the property of a subject. And afterwards, p. 84, he calls the soil and franchise of a port a *jus privatum* clothed and superinduced with a *jus publicum*: and from what follows, respecting nuisances in a port, it is clear that he assumes the liability of the owner of the port to repair. [COLERIDGE, J. A subject cannot establish a port for unlading even on his own land; the permission  
\*793] to unlade, which the creation of a port confers, is a consideration for tolls: why may not such a right to tolls pass to the crown's grantee of a port?] There can be no acquisition of right to claim payment for landing, unless the owner of the land has been in some way a party. The crown cannot impose the duty except for the benefit of the subject: there must be a quid pro quo; 2 Rol. Abr. 172, *Prerogative le Roy* (E) pl. 20; 16 Vin. Abr. 578, *Prerogative of the King* (E, a.) In *The Case of the London Wharves*, 1 W. Bl. 581, 590, PARKER, C. B., said: "The designation of ports is part of the king's prerogative. He might make regulations therein by common law in order to secure his revenue: yet, without an act of parliament, he could not impose new duties." And, in all cases, the duty taken must have reference to the consideration or quid pro quo. Thus it is a good prescription that an owner of a port receives a poundage on merchandise in consideration of his keeping up marks for the port, a crane, &c.; 2 Rol. Abr. 265, *Prescription* (E,) pl. 5; 17 Vin. Abr. 264, *Prescription* (E,) pl. 5; *Vinkensterne v. Ebdon*, 1 Ld. Raym. 384. But the maintaining a quay would not support a claim to take toll for vessels not using the quay; Com. Dig., *Toll* (C;) *Haspurt v. Wills*, 1 Mod. 47; *Warren v. Prideaux*, 1 Mod. 104. It is said that cases upon tolls are inapplicable. But the duty must be in the nature of either a toll thorough or a toll traverse; and, no ownership in the soil being set up,

the claim is of the former kind. In *Truman v. Walgham*, 2 Wils. 296, the court said: "courts are exceedingly careful and jealous of these claims of right to levy money upon the \*subject; these tolls began and were established by the power of great men." Where there is ownership of the soil, the toll may be supported as a toll traverse; and *Crispe v. Belwood*, 3 Lev. 424; *Colton v. Smith*, 1 Cowp. 47; *Serjeant v. Read*, 1 Wils. 91; *Lord Pelham v. Pickersgill*, 1 T. R. 660, and *Regina v. The Marquis of Salisbury*, 8 A. & E. 716, turn upon this principle: but, on the other hand, toll thorough requires a consideration coextensive with the claim; *Truman v. Walgham*, 2 Wils. 296; *The Mayor, &c., of Nottingham v. Lambert*, Willes, 111; *Brett v. Beales*, 10 B. & C. 508, where *Smith v. Shephard*, Cro. Eliz. 710; S. C., Moore, 574, is explained. So the crown cannot grant market tolls of goods not brought to the market for sale; *Kerby v. Whichelow*, 2 Lutw. 1498, 1502, per POWELL, J.; Com. Dig., *Market* (F 1); *Hill v. Smith*, 4 Taun. 520, 533. Cases which may appear to point to a different doctrine will be found to turn merely on the pleading. [COLERIDGE, J. The argument on the other side is, that the goods could not be brought for landing to the port at all without the grant of a port; and that therefore the parties landing the goods there had a consideration.] Such a right grounded on the prerogative of the crown could not be granted away; but there can not be such a right, enabling the crown to tax merchandise along the whole coast of the realm. The case of *The Corporation of Southampton v. Scurlag*, Mad. Firm. B. 220, ch. 10, s. 29, was merely a question between two adverse claimants of toll. In *The Mayor, &c., of Nottingham v. Lambert*, Willes, 111, the court say that "in several of the cases cited there is a particular benefit to \*the subject, as coming into a wharf, coming into a port, or land- ing on the plaintiff's manor or quay, which distinguishes it from toll thorough." But coming with merchandise into the kingdom is not a "particular benefit." *Mayor of London v. Hunt*, 3 Lev. 37, cited on the other side, is explained by the court in *The Mayor, &c., of Nottingham v. Lambert*, Willes, 117; the franchises of London are confirmed by act of parliament. But, further, in *Mayor of London v. Hunt*, 3 Lev. 37, it is said that "the consideration is sufficient; he had the liberty of bringing them into port, which is a place of safety, and therefore implies a consideration in itself: here no port, in that sense, is shown to exist. The language of POWELL, J., in *Wilkes v. Kirby*, 2 Lutw. 1519, referred to on the other side, shows only that the obligation to repair is a sufficient consideration; and it seems to be so understood by Comyns, Com. Dig., *Toll* (A.) *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402, was cited on the other side; but there Lord MANSFIELD said that the "making a port" was a consideration; and here no making was shown. The duties, both in that case and in *Mayor of Exeter v. Trimlet*, 2 Wils. 95, are explained by Lord MANSFIELD, in *The Mayor of Hull v. Horner*, 1 Cowp. 102, 108, to be granted in consideration of repair. No case shows that the mere

permission to land gives the crown, not being owner of the soil, a right to port duties which can be granted away. The power to restrain landing at any but the great ports was first granted by stat. 4 H. 4, c. 20, cited in *Callis on Sewers*, 57. Afterwards, stat. 1 Eliz. c. 11, s. 2, restricted the power of importing to places assigned by the queen, and where there should \*be a customer. And this possibly may explain the \*796] modern usage here: for goods imported, while there was no customer at Teignmouth, must have come to Exeter, where there was one: so that, when a customer was assigned to Teignmouth, the goods were still supposed, erroneously, to be in the nature of goods coming to Exeter; and the duty was claimed accordingly, and submitted to. Stat. 13 & 14 Car. 2, c. 11 s. 14, (which recites stat. 1 Eliz. c. 11, s. 2, but appears to treat that statute as extending farther than its language imports) authorized the issuing of a commission to assign places, ports, members, &c., for the residence of the customers and those acting under them. Under this the commission of 28 Car. 2, issued; the return to which defined a port, including Teignmouth. It seems probable that these fiscal regulations have led to a confusion between a port, in the sense of a district for customs, and a port in the more narrow sense, in respect of which alone port duties could be claimed by a subject. Stat. 6 & 7 W. 4, c. xlii., (a) the Teignmouth Harbour Act, now authorizes (sect. 15) commissioners to determine the boundaries of the "harbour of Teignmouth." The argument as to the weight of evidence is omitted.)

Lord DENMAN, C. J. I am of opinion that the evidence was properly admitted. The documents are more than thirty years old. Burnett's account admits the receipt of 24*l.* 16*s.* 3*d.* The accounts of the alleged receipts by Widger do not exactly form this sum: the slight difference \*797] might be made up in a subsequent \*account: but, at any rate, this could only be matter of observation, more or less strong, as to the value of the evidence. But we find these accounts kept with Burnett's accounts, and appearing to be a part of the vouchers handed over by him. On this ground, I have no doubt at all that they were properly submitted to the jury. On the general question, which comprehends points of novelty and great importance, we will take time to consider.

PATTESON, J. The accounts of Widger's receipts constitute an admission by Widger. Widger, in Burnett's account, is recognised as employed to collect the dues: whether he was so employed by the corporation or Burnett is not important. But Burnett puts in an account of duties, as received by Widger. Why that should not be called a voucher I do not see: a voucher indeed more usually means the account of what a man takes credit for: but it may also mean the account of what he debits himself for. These amount to accounts rendered to Burnett by a servant,

(a) Local and personal, public. "For improving, maintaining, and regulating the harbour of Teignmouth and the navigation of the river Teign in the county of Devon."

and, since they charge the servant, are as much receivable as accounts charging Burnett, to whomsoever they are delivered.

WILLIAMS, J. Burnett clearly appears by this entry to have himself received the sums which he refers to from Widger; and Widger's account of his own receipt of those sums is admissible. It was hardly disputed that flying sheets might, in this way, have been connected with Burnett's account: nor was it said that the identification of the sums mentioned in the two papers was not a matter on which the judge at nisi prius was to exercise his own opinion. A presumption of \*forgery was not to be made; and I cannot see how he could refuse to receive the documents. In themselves they purport to contain accounts rendered to the principal servant of the plaintiffs. We cannot well have a stronger instance of the principle of thus incorporating documents than *Stead v. Heaton*, 4 T. R. 669. [\*798]

COLERIDGE, J. I certainly received the evidence with some doubt. The plaintiffs began by putting in the receiver's accounts. These were objected to: and this led to a detailed description of the customary way of taking and auditing the accounts. It appeared that a party could not be mayor till he had been receiver, and had had his discharge; on the audit, he must have attended with vouchers. The receiver's account spoke of sums received from the sub-agent: and then the two disputed papers were tendered, as being found among the receiver's vouchers, and more than thirty years old. I agree with my brother WILLIAMS that this constituted evidence, not only, as against Burnett, of his having received the sums of which he brought the account, but also, as against Widger, that he had charged himself with that receipt. On this point, therefore, the rule should be discharged. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

In this case, tried before my brother COLERIDGE at the assizes for Devon, being an action for petty customs, dues and duties, due upon culm, fish, oil, seal-skins and other articles, the right of the corporation to exact certain payments, in the name of port dues or petty \*customs, from those who land their goods at the haven of Teignmouth, as a member of the port of Exeter, was established by the verdict of a jury. [\*799]

But a rule nisi for a new trial was obtained, on the suggestion that my learned brother's direction was incorrect in point of law: and several points have been discussed before us, more largely, perhaps, than was warranted by what appears to have been the matter in contest at the trial.

Upon that occasion it was not, and indeed scarcely could have been, contended that the plaintiffs were not owners of a port to some extent, and, as such, entitled to receive the duties claimed in the declaration, within certain limits. But it was argued that the franchise *could* not have been legally granted, so as to extend to Teignmouth and carry a right to port duties there, for want of an apparent legal consideration; and that want was said to be involved in the absence of any right in the soil, either

in the grantees or the grantor, the crown. There was no evidence, it was said, that Teignmouth had at any time been *terra regis*; no soil therefore was dedicated to public use, no repairs done, nothing given in return for the duties claimed; the judge was therefore called upon to direct the jury at once that no case had been made for the plaintiffs, and that, without reference to the evidence of payments insisted on by them, the verdict must pass for the defendant.

My learned brother did not deny that, for the validity of a royal grant of the franchise of a port with the right to collect port dues or petty customs, a consideration was necessary: but he said that the right to create a port was in the crown, which it might exercise *pleno jure*, so long as  
 \*800] there was no interference with the \*rights previously vested; that the consideration for port duties, as attendant on such a grant, need not be the devotion of the soil to the use of the port; that, if so, there was no evidence to support it in the plaintiffs in the present case, even to the limited extent admitted; for that there was none to prove any right of soil in them in the bank or estuary of the Exe, any more than beyond the mouth; indeed their evidence disproved it; but that, considering the very early times to which this grant, if ever made, must be referred, no previously vested inconsistent rights appearing, the mere creation of the port, with the consequent right in all the subjects to use the range within the limits as a port, to bring their ships there for safety, and to trade there, and unload customable goods, would be consideration sufficient in law to support the grant of the duties. He told the jury, therefore, that, as to the mere existence of a port with port duties granted to the plaintiffs, there was no question; that the real question was the extent; as to which they could not throw the plaintiffs' evidence overboard at once on the ground alleged, but that, consistently with all the evidence, there was ground on which they might found a legal origin for the rights claimed by the plaintiffs.

After much consideration of the authorities, we are of opinion that this direction was right in point of law, and at least not too favourably stated for the plaintiffs. We think he might properly have added that, if the ownership of the port carried with it the obligation to clear the harbour or do any thing else in the way of repairing or maintaining it, the non-performance of that duty might render the owners liable, but could not  
 \*801] form a defence to the present action; and that a long \*enjoyment of the duties might warrant the presumption of any fact necessary to make them legal.

As to the general right of the crown in this matter, it will be sufficient to cite the single authority of Lord HALE. "It is a part," says he, "of the *jus regale* or royalty of the crown of England originally and *de novo* to erect public ports in this kingdom. As all franchises within the kingdom are derived from the crown, either immediately and explicitly, as by new erection, grant, or charter; or presumptively and consequentially, as

by custom or prescription; so in a *special manner* are the ports and the franchises thereof, which are *ostia regni*." De Port. Maris, c. 3, Harg. L. T. 53, 54.

That this right of the crown was exercised at some very remote period, and a port created of which Exeter was the caput, cannot now be disputed: and there seems good reason to believe that, when the city of Exeter was granted to the burgesses thereof in fee farm, first by Richard earl of Cornwall, in 1259, and subsequently by Edward III., the port, with the customs which the crown had before received there, passed with the grant as parcel thereof. Lord HALE, in the account which he gives of petty customs (Concerning the Customs, c. 4, Harg. L. T. 139,) states that this was not unusual, and says that these (the petty customs) "being grown inconsiderable in length of time might be granted to the several corporations of those ports or towns wherein they were taken *as part of their farms*; as was done in the cases of Exeter and Yarmouth, Kingston-upon-Hull, and some other ports." We do not cite this passage as proof of the fact, but as showing that, according to that great lawyer's opinion, there is nothing in such a state of things unreasonable, \*or which may not easily be presumed on proper evidence of user. [\*802

We also refer to the statute of H. 8,(a) for the purpose of showing that it has not escaped our attention. But it belongs to the head of evidence, not of law: and may possibly supply either party with some plausible arguments.

Upon the evidence in this case, the grants before mentioned were produced, and strong evidence from a very remote period down to modern times offered of the perception of petty customs and port dues by the plaintiffs as grantees of the port.

Then it appears to us that the extent of the port, de facto, became a question merely of evidence. It could not be denied that a port might be created with a head and many members: the existence of such ports is matter of notoriety; and Lord HALE, mentions many instances, *Exeter* among them, Harg. L. T. 48, in enumerating the members of which he omits Teignmouth, an omission furnishing ground for remark, but not really of weight as evidence of the fact.

In support of their claim the plaintiffs offered some ancient evidence, a receiver's account of the 4 Eliz., in which the officer charged himself with a gross sum of 9*l.* 9*s.* 4*d.* for customs of goods landed in several places (among others Teignmouth) within the port of Exmouth and Exeter; a lease of 35 Eliz., of the town custom, due for entry of all manner of ships, &c., arriving within the port or haven of the city of Exeter, viz. Exmouth, and, among other places, Teignmouth; another lease containing the same enumeration in 8 Jac. 1: on which the rent had been paid. But this, and other evidence of the kind, was not so much of independent strength, \*standing by itself, as indirectly in the support which it gave to the latter evidence, and from its consistency with it. [\*803

The evidence in modern times, down to the year 1834, was clear, unambiguous and uninterrupted.

To all this no answer was given by counter evidence; no claim was set up for Teignmouth as a port of itself, or as a member of any other port: but strong remarks were made on the improbable extent of the port, as claimed by the plaintiffs; and suggestions for the explanation of what was offered by the plaintiffs were urged, reasonable in themselves, and pressed forcibly and ingeniously on the jury. It is not complained of that justice was not done to them by the judge in laying the case before the jury.

A commission in the time of C. 2, was strongly attacked by the defendant's counsel, as applicable only to some proceedings in relation to the revenue; it was even claimed as evidence against the plaintiffs' claim to port duties, as explaining the circumstance of Teignmouth being named with Exeter. But it could not explain the ancient enjoyment: it was in no degree inconsistent with any fact essential to the plaintiffs' title; and, at all events, the effect of it was for the consideration of the jury.

Having disposed of the legal objections to the summing up, we are asked to grant a new trial on these latter grounds, as if the verdict ought to be considered against the evidence. We think we cannot in justice do this. Where a verdict has been obtained in support of such a claim, founded on evidence not unsatisfactory to the judge, and given by a jury under no unfair bias, and properly directed, we think it ought not to be lightly disturbed.

This rule will therefore be discharged.

Rule discharged.

**\*804] \*EVANS and WHEELTON v. COLLINS and RIGLEY.**

A sheriff declared in case, for that, defendants being attorneys of P., who had sued out a *ca. sa.* against John Wright, and the sheriff having in custody (under another *ca. sa.*) another John Wright who was entitled to his discharge, defendants, well knowing the premises, falsely represented to the sheriff that the last mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof defendants caused the sheriff to detain the J. W. who was in his custody; for which the last mentioned J. W. sued the sheriff, and he paid money by way of compromise.

The attorneys pleading not guilty, evidence was given, for the sheriff, that his officer delivered a note to the defendants' managing clerk in P.'s action, describing the John Wright who was in custody, and inquired if that was the John Wright whom they had sued on behalf of P.; and that the clerk took the letter into the office where defendants were, and afterwards returned and told the officer that that was the John Wright; neither defendants nor the clerk at that time knowing the contrary.

*Held* by the Court of Queen's Bench that, on this evidence, the jury were warranted in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the misstatement of their clerk. Also, that the action lay, though the detainer was made, and the money for compromise paid, by the sheriff's officer, and not by himself.

But *held* by the Court of Exchequer Chamber,

That a plea alleging that defendants had good and probable reason to believe, and did with good faith believe, the representation to be true, was an answer to the action.

The Court of Queen's Bench having given judgment for plaintiffs non obstante veredicto on this plea.  
Judgment reversed.

CASE. The declaration charged that, before the committing, &c., to wit on, &c., defendants, as attorneys of David Power, caused to be issued out of the Common Pleas a testatum ca. sa. against John Wright, at the suit of Power, directed to the sheriff of Middlesex, commanding him to take Wright, wheresoever, &c., to satisfy Power a certain debt, &c.; which writ defendants, as such attorneys, before the committing, &c., to wit on, &c., caused to be, and the same was, delivered to plaintiffs, who then and until and at the time of the committing, &c., were sheriff of Middlesex, to be executed: that afterwards, and while plaintiffs continued such sheriff, and before the committing, &c., to wit on &c., plaintiffs lawfully had and detained in their custody, as such sheriff, in a certain prison of plaintiffs, as such sheriff, to wit, &c., (Whitecross Street prison,) being the debtors' prison \*for Middlesex, a certain other John Wright, not being the same person as the J. W. against whom the said writ at the suit of Power had been issued as aforesaid, that is to say, under and by virtue of a certain other testatum ca. sa., issued out of the Queen's Bench at the suit of one Benjamin Mosedon, and directed to the said sheriff of Middlesex. [\*805

The count then stated that afterwards, and after the delivery to plaintiffs of the testatum ca. sa. at the suit of Power, while plaintiffs continued such sheriff, and while the said John Wright, hereinbefore mentioned to have been lawfully detained in the custody of plaintiffs as such sheriff, was and continued lawfully in such custody, to wit on &c., the last mentioned John Wright became and was lawfully entitled to his discharge from such custody; and it then became and was the duty of plaintiffs, as such sheriff, to discharge, and plaintiffs, as such sheriff, but for the committing of the said grievance by defendants as hereinafter mentioned, would then have discharged, and were then about to discharge, the last mentioned J. W. from their said custody; yet, defendants so being such attorneys of D. Power as aforesaid, well knowing the said premises, after the delivery to plaintiffs of the testatum ca. sa. at the suit of Power, while plaintiffs continued such sheriff, after the last mentioned J. W. had so become and was entitled to be discharged, and was about to be discharged, by plaintiffs out of the custody of plaintiffs, to wit on, &c., defendants, so being such attorneys, &c., for the purpose of preventing plaintiffs from discharging the said last mentioned J. W. from their said custody, which plaintiffs were then about to do, and would otherwise have done, falsely represented and declared to plaintiffs, so being \*such sheriff, that the last mentioned J. W., so then being in the lawful custody of plaintiffs as such sheriff, and whom the plaintiffs were then about to discharge from their said custody, was the same person as the other J. W. hereinbefore mentioned, against whom the said writ at the suit of Power [\*806

had been issued by defendants as attorneys of Power; whereas, in truth and in fact, the said J. W., whom plaintiffs were so then about to discharge from their custody, was not the same person as the said J. W. against whom the said writ of testatum ca. sa. at the suit of Power had been issued by defendants as aforesaid, but was another and different person: and defendants, by so falsely representing and declaring the said persons to be the same, for the purpose of preventing the discharge from custody of the said J. W. so being in the custody of plaintiffs as such sheriff, did then, to wit on, &c., and from thence for a long space of time after the said last mentioned J. W. had so become and was entitled to his discharge and ought to have been discharged as aforesaid, to wit for the space of, &c., and until the discharge of the last mentioned J. W. from custody as hereinafter mentioned, (during all which time plaintiffs continued sheriff of Middlesex,) cause plaintiffs, as such sheriff, to keep and detain the said last mentioned J. W. in their custody as such sheriff, under the supposed authority of the writ of testatum ca. sa. at the suit of Power: and plaintiffs, being during all that time wholly ignorant and without any notice whatsoever from defendants, or otherwise, that the said J. W. so being in their custody and the said J. W. against whom the said writ at the suit of Power had been issued as aforesaid were not the same person, and, on

\*807] the contrary thereof, confiding in the said \*false representation and declaration of defendants that they were the same person, and believing the same to be true, did, by reason and means of the said false representation and declaration of defendants, keep and detain the said last mentioned J. W. in their custody as such sheriff, to wit in the prison aforesaid, under the supposed authority of the said writ of testatum ca. sa. at the suit of Power, as and for the same J. W. in the said writ last aforesaid mentioned, for a long space of time after the said J. W., so being in the custody of plaintiffs, had so become entitled to be discharged and ought to have been discharged from the said custody, to wit for the space, &c., and until the 18th June, 1840: on which day, and not before, plaintiffs discovered and ascertained that the said representation and declaration of defendants was false, and that the said J. W. so being in their custody as aforesaid and the said J. W. against whom the said testatum ca. sa. at the suit of Power had been issued were not the same person: and plaintiffs did thereupon then, to wit on, &c., forthwith discharge the said J. W. whom they had so detained as aforesaid from their said custody: By reason and means of which premises, afterwards, and after the discharge of the last mentioned J. W., and before the commencement of this suit, to wit on, &c., the last mentioned J. W. commenced and prosecuted an action, &c., against plaintiffs, for and in respect of the said illegal detainer and imprisonment, &c., occasioned as aforesaid: and such proceedings were thereupon had that afterwards, to wit on, &c., the now plaintiffs, in order to settle the said action, &c., were forced and obliged to pay, and did necessarily and properly and with the consent of defend-

an's pay, to the last \*mentioned J. W. a large sum, &c., to wit 10*l.*, as and for damages and compensation (being a reasonable sum in that behalf) for the illegal detainer, &c., occasioned aforesaid, and for which the last mentioned action was so commenced and prosecuted, and also the further sum, &c., (33*l.* costs :) and also plaintiffs, by means of the premises, were forced, &c., to sustain and incur, &c., (costs in defence.)

Pleas. 1. Not guilty. Issue thereon.

2. That defendants did not cause plaintiffs to keep or detain J. W. in the declaration in that behalf mentioned in their custody under the supposed authority of the said testatum ca. sa. at the suit of Power, and plaintiffs did not, by reason and means of the said representation, &c., of defendants, keep or detain the same J. W. in their custody, under the supposed authority of the same writ, for any part of the time in the declaration in that behalf mentioned ; and plaintiffs were not forced, &c., to, nor did necessarily, &c., nor with the consent of defendants, or either of them, pay to the same J. W. the sums in the declaration in that behalf mentioned, or either of them, &c. ; nor were plaintiffs forced, &c., to sustain or incur, nor have they sustained, &c., the costs, &c., in the declaration mentioned, or any or either of them, or any part thereof, in manner, &c. : conclusion to the country. Issue thereon.

3. That, at the time defendants made the representation, &c., in the declaration mentioned, they, defendants, had good and probable reason to believe, and then did with good faith believe, that the said representation, &c., was true, and that the said J. W. then in the custody of plaintiffs as such sheriff was the same person as the other J. W. against whom the said writ of testatum ca. \*sa. at the suit of Power had been and was issued : verification. Replication : de injuriâ. Issue thereon.

4. That just before the time of the committing, &c., to wit on, &c., plaintiffs inquired of defendants if the said J. W. in the custody of plaintiffs was the same person as J. W. against whom the said writ at the suit of the said David Power had been issued, and plaintiffs then informed defendants of the residence of the said J. W., then in their custody, before and at the time he was taken, and then described to plaintiffs the same J. W., and such information and description then corresponded with the supposed residence and the description of the said J. W. against whom the said writ at the suit of the said D. Power had been issued, and then induced defendants to believe it probable that the said J. W. was the J. W. against whom the said writ had issued at the suit of the said D. Power ; and defendants then informed plaintiffs that they considered it probable that the said J. W. in the custody of plaintiffs was the J. W. against whom the last mentioned writ had issued, and then declined to speak with certainty as to the identity of the two J. W.s ; and plaintiffs then requested defendants to state that the said J. W. in custody of plaintiffs was the J. W. against whom the said writ had issued at the suit of the said D. Power :

and thereupon defendants, at the request of plaintiffs, at the said time when, &c., with good faith represented and declared to plaintiffs, as in the declaration mentioned, defendants not then knowing that the said J. W. in the custody of plaintiffs was not the J. W. against whom the said writ had issued at the suit of the said D. Power: which is the same supposed grievance, &c.: verification. Replication: that plaintiffs did not  
 \*810] request defendants to state that the J. W. in the custody of plaintiffs was the J. W. against whom the said writ had issued at the suit of the said D. Power: and defendants did not commit the grievance in the declaration mentioned at the request of plaintiffs in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in London after Easter term, 1842, the material facts appeared to be as follows. Some time before June, 1840, the defendants below, as attorneys for Power, had sued out a ca. sa. against John Wright, and lodged it with the sheriff of Middlesex, and a warrant was thereupon granted to Slowman, the sheriff's officer. In June, 1840, the ca. sa. not having yet been executed, the plaintiffs below, as sheriff of Middlesex, had in their custody, in Whitecross Street prison, another John Wright of Pell Street, Ratcliffe Highway, under a ca. sa. at the suit of one Mosedon. The latter John Wright became entitled to his discharge under the Insolvent Debtors' Act: and a note was thereupon sent to Slowman from the sheriffs' office, desiring him to certify whether John Wright of Pell Street then in the debtors' prison was the same person with the defendant in *Power v. Wright*, and, if so, whether Slowman had lodged his warrant with the keeper of the prison; and to return the note immediately without fail; and to lodge his warrant in Power's action (if not already lodged) with the keeper forthwith. Slowman sent the note to the office of Messrs. Collins and Rigley, the defendants below. The messenger saw there the principal common law clerk, named Freeman, to whom he showed the paper, and stated that he came from Slowman, and that Slowman wished to know whether the person in  
 \*811] custody was the same with the John Wright against whom Messrs. Collins and Rigley had sued out a ca. sa. Freeman at first doubted whether he could properly state this: but, on further conversation with the messenger, and on his request that Freeman would certify the identity as the note required, he wrote on the back: "The within defendant is the same person whom we have lodged a ca. sa. against for David Power. Collins and Rigley, plaintiff's attorneys." (a) In consequence of this proceeding, the defendant in *Mosedon v. Wright* was detained some time in custody after he had become entitled to his discharge. He brought an action against the sheriff, the now plaintiffs, for false imprisonment; and Slowman then requested Messrs. Collins and Rigley to permit the sheriff to settle the action. Collins and Rigley wrote in answer:

(a) See further, as to this part of the case, the judgment of the Court of Queen's Bench, p. 817, post.

July 15th, 1840.

*“Wright v. Sheriff of Middlesex.*

“Sir,—Without admitting that any responsibility attaches to us by reason of any endorsement by us in this action, we undertake to make no objection to any mode of settlement which the sheriff may deem it proper to make to this action. We remain,” &c.

Slowman then paid 10*l.* of his own money to the last named plaintiff Wright, by way of compensation.

It did not appear in evidence that Messrs. Collins & Rigley had in any direct manner authorized the endorsement by Freeman.

For the defendants it was urged, as ground for a nonsuit: That the payment by Slowman was not a \*payment by which the plaintiffs were [ \*812  
damnified, and therefore no action lay: And that the defendants were not liable, because Freeman had no authority to give the endorsement on their behalf: and because the statement furnished by him was made bonâ fide, and without knowledge of its untruth. The learned Judge left it to the jury to say: 1. Whether Freeman, as managing clerk, had such a general authority as entitled him to sign the certificate in question.(a) 2. Whether he had probable reason for believing that the John Wright in custody was the defendant in *Power v. Wright*. 3. Whether the plaintiffs were induced by that representation to detain Wright in custody. The jury found in the affirmative on all the points; and a verdict was taken for the plaintiffs on the 1st, 2d and 4th issues, and for the defendants on the 3d. The learned Judge directed that the verdict should be entered for 1*s.* damages on the 1st, 2d and 4th issues, giving the plaintiffs leave to move that the sum should be increased to 10*l.* if the court should think them entitled to recover the whole sum paid by Slowman. He also gave leave to move for a nonsuit on the first point above stated; or, if the court should think, on the whole case, that there was no evidence for the jury.

In Trinity term, 1842, a rule was obtained calling on the plaintiffs to show cause why a nonsuit should not be entered for the reasons stated at the trial, or a new trial had on the ground of misdirection, and because the verdict was against the weight of evidence.

A cross rule was obtained in the same term calling on \*the de- [ \*813  
fendants to show cause why the damages should not be increased to 10*l.*, and why judgment should not be entered for the plaintiffs, non obstante veredicto, on the third issue.

In Trinity term, 1843, (b)

*Erle* and *Humfrey* showed cause on behalf of the plaintiffs, and supported their rule. The action was maintainable by the sheriff to the full amount of 10*l.* That the plaintiffs themselves, as sheriff, suffered no pecuniary loss, is not an answer. Though they were indemnified from any ultimate loss by

(a) Questions had been put to Freeman, and statements made by him, on the trial, as to the powers which he exercised, as managing clerk, in other respects.

(b) June 8th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

the bond of their officer, the vexation of being exposed to a suit at law is sufficient ground for their action. And they were entitled to recover the whole sum of 10*l.* paid by Slowman. The defendant's letter of July 15th is an admission that the sheriff was entitled to compromise the action brought by Wright; and the plaintiffs, having, as defendants on the record, and as sheriff, made such compromise, might, according to many analogous cases, recover the amount paid, as trustees for Slowman. *Lamb v. Vice*, 6 M. & W. 467, resembles this case: and the observations of the Court there upon the equitable right to sue for the benefit of parties actually interested are an authority for the present plaintiffs. When a ship is run down and insurers have made good the loss, they sue in the owner's name, though he has sustained no pecuniary injury. Slowman, in this case, could not have sued in his own name.

\*814] As to the authority of Freeman, a jury might \*properly infer from the evidence that he was authorized by the defendants to make the statement on which the sheriff acted.

As to the scienter, though the declaration avers knowledge by the defendants that their statement was untrue, it was not necessary that actual knowledge should be proved: it was sufficient that the defendants alleged something to be true which they did not know to be so, and thereby caused injury to the plaintiffs: therefore the plaintiffs were entitled to the verdict on the first, second, and fourth pleas, and ought to have judgment non obstante veredicto on the third. (All the material points urged and authorities cited for the plaintiffs, on this part of the case (among which was *Humphrys v. Pratt*, 5 Bligh, N. S. 154,) were brought before the Court of Exchequer Chamber, and will be found in the report of the arguments there.) (a)

If the argument on these points be correct, there is no ground for either a nonsuit or a new trial.

*Platt and Peacock*, contra. First, the plaintiffs are not entitled to recover the 10*l.* as trustees for Slowman. He might have maintained an action on his own behalf. *Lamb v. Vice*, 6 M. & W. 467, was a totally different case. There the plaintiff, the Knight Marshal of the Palace Court, had taken a bond conditioned for due performance of the defendant's duties as an officer of that Court: the penal sum was forfeited by any breach of that \*815] condition; and the plaintiff would recover it as trustee for \*those whom the bond was intended to protect. But the sheriff here is not trustee for the officer. He holds the officer's bond as a security to himself against the officer's misconduct. It does not follow that, if the officer incurs a forfeiture by the fault of some other party, the sheriff may sue that party for the officer's benefit. The bond being solely for the sheriff's protection, if he is not damnified, there is no person on whose behalf he ought to sue. Nor have the plaintiffs sustained any damage at all for which an action lies. The misrepresentation was made to the officer, not the sheriff; the information was required by the officer for the discharge of

(a) Except *Smout v. Ilbery*, 10 M. & W. 1, which was cited in the Queen's Bench by Erie.

his own duty; he, not the sheriff, was damnified by mistake, and might have brought the action, if it lay. Where a false representation is made as to credit, the party deceived cannot sue if he has not given credit, or has been paid, or is indemnified. If he is indemnified, he cannot sue as trustee for the person giving the indemnity. The cases as to the right of action for a mis-statement, where no damage has resulted, were lately reviewed in this court; *Wylie v. Birch*, 4 Q. B. 566.

The scienter was put in issue by the plea of Not guilty, as appears from R. Hil. 4 W. 4, *Pleadings in Particular Actions*, IV., 5 B. & Ad. ix., and the example there given of an action of slander, where the plea, though it admits introductory averments as to the plaintiff's office or profession, operates as a denial of speaking the words "maliciously, and in the sense imputed, and with reference to the plaintiff's office," &c. So, in an action for \*malicious prosecution, Not guilty puts in issue the existence of [\*816] probable cause. In *Humphrys v. Pratt*, 5 Bligh, N. S. 154, the representation by which the defendant induced the sheriff to seize was, in effect, a warranty, and an implied promise to indemnify. Here the attorneys were not obliged to give any information to the sheriff; the question was put, not for the benefit of their client, but for the sheriff's own security: the statement, therefore, if their's, could not be considered a warranty; and consequently they were not liable for its being untrue, unless they knew of its falsehood; *Moens v. Heyworth*, 10 M. & W. 147. If the statement did amount to a warranty on which an action lies, it could not be *Freeman's* duty, nor could he have authority, merely as managing clerk, to give it. (The rest of the argument as to the materiality of knowledge on the defendants' part is omitted for the reason before given.) *Cur. adv. vult.*

LORD DENMAN, C. J., in the ensuing vacation, (June 24th, 1843,) delivered the judgment of the Court.

The plaintiffs were the late sheriffs of London, and brought this action against two persons, attorneys for one Power, who had sued John Wright for a debt and obtained execution against him, for falsely representing another John Wright (who was then in custody of the plaintiffs) to be the defendant in that action, *though they knew the contrary*: by which false representation the plaintiffs were induced to detain the wrong person, who thereupon brought an action against them, and therein recovered (by way of compromise) 10*l.*, in respect of the unlawful imprisonment. To this declaration, Not guilty \*was pleaded, and, among other pleas, not now [\*817] requiring observation, 3dly, That the defendants had reasonable and probable cause to believe the person whom they pointed out to be the real defendant.

On the trial, at Guildhall, before my brother WIGHTMAN, the plaintiffs obtained a verdict on all the pleas but the third, with 1*s.* damages. The jury found for the defendants on the third; with leave to move for a nonsuit ' the court should think fit on a consideration of the evidence; and with

leave for the plaintiffs to move for an increase of the damages to 10*l.*, if entitled thereto. The defendants obtained a rule for a nonsuit, and also for a new trial for a verdict against evidence; and, if they should fail in both, then in arrest of judgment for the insufficiency of the declaration; and the plaintiffs their cross rule, and also for judgment non obstante veredicto on the third plea. Both were argued at great length.

The following facts appeared on the learned judge's notes. The plaintiffs, having the writ against John Wright, handed it to their officer, Slowman, who, hearing of a person of that name being under arrest, described him by a letter to the managing clerk in that action for the defendants, and inquired if that was John Wright. The clerk took the letter into the office, where the defendants were, and, after some little time, returned and told him that that was John Wright. Thereupon Slowman kept him in prison. He brought his action against the sheriffs, who called on Slowman; and Slowman compromised the action with them for 10*l.*, which he paid with his own money.

We think, in opposition to the defendants' argument, that here was clear  
 \*818] evidence for the jury that the clerk made the representation with the authority of his principals; and that they were justified in finding that fact. We think, too, that the action was maintainable by the sheriffs, though the act was that of their officer and not of themselves, and the money paid by way of compromise was his, not theirs, they being primarily liable for his unlawful arrest, and competent to sue for his benefit if the unlawful act was produced by the defendants' misconduct. The agency of Slowman for the plaintiffs, so as to entitle them to sue, and that of the clerk for his employers, so as to fix them with false representation, were both well proved.

It was not contended by the learned counsel for the defendants that the third plea found for them could be sustained; but they claimed a verdict on the first plea, or a nonsuit, for want of proof that the defendants knew their representation to be false, such knowledge being averred, as they said, in the declaration; the plaintiffs, on the other hand, maintaining that, if the representation be false and injurious, the defendant's knowledge of its falsehood is immaterial, even if it be averred, which they denied.

Many authorities were adduced on both sides, none directly in point. *Corbett v. Brown*, 8 Bing. 33, bears a strong resemblance to the present case, and was in a great measure the foundation of *Humphrys v. Pratt*, 5 Bligh, N. S. 154, in the House of Lords, in which a sheriff brought his action against the execution creditor for falsely representing to him that the plaintiff's goods were the debtor's property, whereby he was induced to  
 \*819] seize them, and afterwards compelled to pay damages for the seizure. The plaintiff recovered in the *Irish* Court of King's Bench a judgment affirmed in the House of Lords. The only difference in the facts is, that in that case goods were seized; in this, the debtor himself was arrested.

But there the declaration contained no averment of knowledge : here knowledge was averred and disproved.

Upon consideration, we hold that the principle of *Humphrys v. Pratt*, 5 Bligh, N. S. 154, must be applied to the present case. One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame ; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true : and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation that the defendant knew his representation to be false is therefore immaterial : without it, the declaration discloses enough to maintain the action ; and nothing that goes beyond that necessity need be proved.

It follows from this, and what we before observed, that the defendants' rule must be discharged, and that the plaintiffs must have their rule absolute to increase the damages to the sum bonâ fide paid by Slowman to the person improperly arrested under the defendants' information.

Plaintiffs' rule absolute.

Defendants' rule discharged.

\*The case being mentioned again on a subsequent day in the vacation, (June 29th,) THE COURT said that the plaintiffs' rule must be absolute in all its terms. [\*820]

Rule absolute for judgment non obstante veredicto on the third issue.

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## IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

### COLLINS and RIGLEY v. EVANS and WHEELTON.

ERROR was brought in the Exchequer Chamber on the record in *Evans v. Collins*, the grounds assigned, in addition to the common ones, being that the declaration was not sufficient in law, (a) and that the third plea was sufficient. The case was argued in last Michaelmas vacation. (b)

*Peacock*, for the plaintiffs in error, (the defendants below.) It is not necessary to consider whether the declaration contains a sufficient charge ; for, if the objection to it be a good one, namely, that knowledge by the defendants below is not properly averred, that objection is raised sufficiently by the

(a) It was stated in the margin of the error book, as one ground of error, that the declaration did not allege that the defendants acted fraudulently, and the finding of the jury on the third issue showed that they acted bonâ fide.

(b) November 28th, 1843. Before Tindal, C. J., Coltman, Erskine, and Maule, J., and Park, Alderson, Gurney, and Rolfe, B.

finding of the jury on the third plea. It must be now taken, on the record, that the defendants below had reasonable grounds for believing what they  
 \*821] said to be true, and therefore, of course, that \*they did not know that what they said was not true. In *Pasley v. Freeman*, 3 T. R. 51, it was held that an action may be maintained against a party making a false assertion with intent to defraud, though he be not benefited, and be not in collusion with any one who is benefited. BULLER, J., there says: "Fraud without damage, or damage without fraud, gives no cause of action: but where these two concur, an action lies;" for which he cites the language of CROKE, J., in *Baily v. Merrell*, 3 Bulst. 94; *Tapp v. Lee*, 3 B. & P. 387, is to the same effect. In the two cases of *Foster v. Charles*, 6 Bing. 396, 7 Bing. 105, the action was held to lie, because the defendant knew that the representation which he made was false. TINDAL, C. J., in his judgment upon the second case, 7 Bing. 107, says: "The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad: the person who makes such representations is responsible for the consequences." So in *Polhill v. Waller*, 3 B. & Ad. 114, though the jury negatived fraud in fact, yet the action was held to lie, because the representation made by the defendant was false within his knowledge. *Corbett v. Brown*, 8 Bing. 33, is another instance of the same principle, which agrees perfectly with that upon which *Freeman v. Baker*, 3 B. & Ad. 797, was decided, where the action was held not to lie, for want of knowledge. The decision in the present case, in the court below, rests principally on the authority of *Humphrys v. Pratt*, 5 Bligh, N. S. 154, in the House of Lords. The  
 \*822] grounds of that decision do not distinctly appear. But the defendant there pointed out to the sheriff certain goods, and required him to seize them. The real owner of the goods might there have sued the defendant in trespass, as a party to the seizure. Here nothing appears but a naked representation. The defendant there made the plaintiff his agent, and impliedly undertook to indemnify him. This is the principle applied to the case of a party who has been induced by another to sell goods not belonging to the latter, and sues for damages resulting from the false information. Thus, where the "plaintiff is hired by defendant to sell," that "implies a warranty to indemnify against all the consequences that follow the sale;" and a *scienter* on the part of the defendant is therefore not necessary, in that case, to entitle the plaintiff to recover; *Adamson v. Jarvis*, 4 Bing. 66, 73. Further, in *Humphrys v. Pratt*, the party making the representation got a benefit by it. In Chitty on Contracts, (a) the decision in *Adamson v. Jarvis* is supposed to rest on this ground. And it is said by the reporter of *Humphrys v. Pratt*, that Lord Tenterden privately declared the ground of his judgment to have been that the sheriff "was placed between two fires."

(a) Note (c) to p. 448, (3d ed.)

But here that difficulty was not imposed on the sheriff, as the defendants did not call upon him to detain Wright.

*Erle*, contra. The fallacy of the argument on the other side lies in assuming this to be a case of false representation between strangers. In most of the cases \*cited nothing more appeared. Now, though it may perhaps be inferred from *Ramsey v. Eaton*, 10 M. & W. 22, that [\*823 the sheriff is not to all purposes the agent of the execution creditor, there clearly is a connection between them, and the sheriff is responsible to the creditor. *Freeman v. Baker*, 5 B. & Ad. 797, was a case of vendor and purchaser without warranty as to the particular defect imputed; and the rule of *caveat emptor* applied. But, where the parties stand in a mutual relation, as of the employer and employed, there, if one of them, assuming to have knowledge of facts, and having, presumably, better knowledge than the other, thereby induces the other to act, the party so inducing must take the responsibility. *Adamson v. Jarvis*, 4 Bing. 66, rests upon this principle; which is illustrated by *Crosse v. Gardner*, Carth. 90, and *Medina v. Stoughton*, 1 Salk. 210. [MAULE, J. It seems that in those two cases, where the question was between buyer and seller in actual possession, a warranty as to the ownership was considered to be implied.] *Humphreys v. Pratt*, 5 Bligh, N. S. 154, cannot be effectually distinguished. The only difference is that there the false representation related to goods and not the person: the benefit here was as great as there; the body is as complete a satisfaction of the judgment as goods. Goods of a stranger do not pass by a seizure, nor by the recovering of judgment for the seizure. [TINDAL, C. J. The property does not pass in any case by the judgment, but only by satisfaction of the judgment. (a)] No stress was there laid on the allegation of the defendant's request. An \*execution creditor has been held liable in [\*824 trespass to the owner of goods for merely pointing them out to the sheriff as the goods of the judgment debtor. [TINDAL, C. J. That is so laid down in Rolle. (b)] The reason is, that this is tantamount to a request. But, further, the affirmation of a fact is an affirmation that the party knows that fact. [ERSKINE, J. Is not that met by the finding of the jury on the third plea? PARKE, B. It seems to come to the principle of *Haycraft v. Creasy*, 2 East, 92.] In *Polhill v. Walter*, 3 B. & Ad. 114, the defendant, who represented that he was authorized to accept by procuration, was held liable upon its turning out that he was not so authorized, though he really believed that the acceptance would be sanctioned. [PARKE, B. He made a false representation as to his then state of knowledge. MAULE, J. If he had said, "I expect to get an authority, but have none now," the acceptance might not have been taken.] So, here, if the defendants below, instead of representing Wright to be the execution debtor, had merely said that they believed him to be so, the sheriff might not have acted upon the

(a) See note (a) to *Halmer v. Wilson*, 10 A. & E. 511, and note (s) to *Wilbraham v. Sam*, 2 Wms. Saund. 47, cc. (6th ed.)

(b) Referring, probably, to 2 Rol. Abr. 553, *Trespass* (P), pl. 3.

representation. They assert their own knowledge; the case therefore resembles *Polhill v. Walter*, 3 B. & Ad. 114. The sheriff could not venture to neglect such information: if true, it would have been evidence against him in an action by the execution creditor for not taking. In *Fuller v. Wilson*, 3 Q. B. 58, the defendant was held liable for a false representation by her agent, though the agent did not know that it was false, because the defendant knew the falsehood, though she had not instructed her agent to  
 \*825] make the representation. That judgment was indeed reversed; *Wilson v. Fuller*, 3 Q. B. 68, 1009: but the reversal proceeded, not on any substantial disaffirmance of the judgment, but on the insufficiency of the statement of facts in the special verdict, which did not show the same state of things as that presented to the court below.

*Peacock*, in reply. The absence of knowledge is fully shown by the third plea. *Crosse v. Gardner*, Carth. 90, is explained by the Court in *Adamson v. Jarvis*, 4 Bing. 66, 73. *Shrewsbury v. Blount*, 2 M. & G. 475, is a direct authority for the defendants below. *Humphrys v. Pratt*, 5 Bligh, N. S. 154, must have been decided on the principle of *Adamson v. Jarvis*, the express request constituting an agency. But, in general, the sheriff is to take on himself to ascertain the proper person or goods. It may be that, where an execution creditor points out goods to the sheriff, a jury may infer a request to take: but such a request will be the ground of the action, and must be averred. *Wilson v. Fuller* is in favour of the plaintiffs in error: the knowledge by the agent was not shown; and on that ground it was held that this representation furnished no cause of action. It is to be observed that in *Humphrys v. Pratt* the sheriff had paid the value of the goods in damages to the party whose goods were seized: the property therefore had passed; and the defendant, the original execution creditor, had received the benefit of the misrepresentation. *Cur. adv. vult.*

TINDAL, C. J., in this vacation, (February 1st,) delivered the judgment of the court.

\*826] \*The question upon this record arises upon the third plea to the declaration, and the issue thereon, which was found for the defendants, the Court of Queen's Bench having given a judgment for the plaintiffs below notwithstanding the verdict found for the defendants on that plea, upon the ground that such plea affords no legal answer to the plaintiff's action. The declaration alleges that the defendants falsely represented and declared to the plaintiffs, being sheriff of the county of Middlesex, that one John Wright, who was then in the lawful custody of the plaintiffs as sheriff of the county of Middlesex, was the same person, John Wright, against whom a writ of testatum capias ad satisfaciendum had been issued by the defendants below, whereas, in truth and in fact, he was not the same person, but another and different person. The defendants pleaded (thirdly) that they had good and probable reason to believe, and then did with good faith believe, that the said representation and declaration was true, and that the said John Wright, then in the custody of the plaintiffs as such sheriff, was the same

person as the other John Wright, against whom the writ of testatum ca. sa. had been issued: which plea was traversed by the plaintiffs, but found by the jury for the defendants below.

The question, therefore, before us is, whether the defendants, having reason to believe, and actually believing, a fact to be true, and representing it as such to the plaintiffs, are liable to an action if it turns out in the event that they were mistaken, that is, whether falsehood in a statement, without fraud, is actionable. It is unnecessary to determine (upon which, however, a question has been made) whether the declaration contains an allegation sufficiently distinct and precise that \*the defendants did know the statement to be false: for, even if there is such allegation, the find- [\*827  
ing of the jury on the third plea negatives it; and the question is brought round again precisely to the same point, viz., whether a statement or representation, which is false in fact, but not known to be so by the party making it, but on the contrary made honestly and in the full belief that it is true, affords a ground of action.

The current of the authorities, from *Pasley v. Freeman*, 3 T. R. 51, downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action. In *Pasley v. Freeman*, the defendant knew that the statement which he had made was false: and the action was held to be maintainable. In *Haycraft v. Creasy*, 2 East, 92, (a) the defendant made a false representation, but did not know it to be false; on the contrary, he believed it to be true: and it was held no action would lie. And in the latter case nothing could be stronger than the terms of asseveration used by the defendant, or more calculated to deceive the plaintiff, namely, that he could positively state the solvency of the party from his own knowledge, and not from hearsay: the three Judges, upon whose authority that case was decided for the defendant, holding that, in the absence of fraud, the assertion amounted to no more than an expression of firm belief and conviction, and not absolute knowledge, in the strict sense of that word: and this doctrine has been upheld by many cases of a later date, referred to in the argument, and has been contradicted, so far as we are aware, by none.

\*Unless, therefore, the present case can either be distinguished from those referred to, or can be held to be governed by the direct [\*828  
authority of some decided case bearing on the very point, we think the conclusion must follow, that the plaintiffs are not entitled to recover upon this record.

And we think the circumstance, that the defendants had better means of knowledge than the plaintiffs of the truth of the statement made, which was one ground of distinction relied upon in argument, is not a sound reason for holding the present defendants liable: for such was a fact common to all the cases of actions for false representations. The plaintiff, in all those cases, being ignorant of the state of his debtor's solvency, makes inquiry of

(a) See the judgment of Lord Mansfield in *Bree v. Holbeck*, 2 Doug. 654.

those who have better means of knowledge than himself; and yet, in all those cases, if the answer given is honest, though untrue in point of fact, the action has been held not to be sustainable. Neither, again, can this case be distinguished from the others on the ground that the defendants had an interest in the representation they made, and that it was information given for their own benefit: for they could have no interest in stating the John Wright who was then in actual custody to be the defendant against whom the writ was issued, if he was not so: on the contrary, it would be so far from a benefit to them, that it would be an actual injury if the wrong man was detained, as it would give the real defendants in the action the greater opportunity of avoiding the arrest under the writ.

The only question, therefore, is, whether the present case is to be governed  
 \*829] by the decision in *Humphrys v. \*Pratt*, which forms the main ground upon which the Court of Queen's Bench have rested their judgment in favour of the plaintiffs below. For, if the decision in that case applies to the facts of the present case, the law to be collected from it, brought as it was before the highest tribunal, must be taken to govern our decision. In that case, the declaration stated that the defendant represented and affirmed to the plaintiff (the sheriff) that the judgment debtor was possessed of certain goods and chattels liable to be seized under the writ, which goods and chattels the defendant would then and there cause to be shown to the plaintiff; and then and there required the plaintiff to seize the said goods and chattels under the said execution: and the declaration then proceeds to allege that the plaintiff did afterwards, believing the representation to be true, at the request, and by the direction and at the requisition, of the said defendant, seize goods and chattels, which were then and there shown by the defendant to the plaintiff, as and for the goods and chattels liable to be seized under the writ; and concludes by alleging that the defendant then and there deceived and defrauded the plaintiff in this, that the said goods and chattels were not the property of the judgment debtor. Upon this state of the record the House of Lords held that the plaintiff below was entitled to retain his judgment, notwithstanding the declaration did not allege that the defendant below knew his representation to be untrue. No reasons are assigned for the decision: but there is a ground apparent on the face of the declaration which will well support it, without breaking in on the authority  
 \*830] of any of the decided cases. The declaration states that the \*judgment creditor pointed out the goods, and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods: and, if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any other individual in that position, whether sheriff or not, may recover over, against his master or principal, the damages he has been obliged to pay in consequence of obeying such directions. To make that case parallel with the present, it ought to have appeared upon this record that the defendants below had not only represented John Wright to be the real party liable to the arrest, but

had required the sheriff to take or to detain him : which is so far from being the case, that the sheriff was left after such representation to his own discretion, whether he would act upon it or not. It is obvious that the sheriff, by the single inquiry whether the plaintiff in the action required him to take or detain the individual or not, or by asking whether the plaintiff would indemnify him or not, might have protected himself from any danger ; but, not having so done, and the case resting upon a mere representation untrue in fact but honestly made, we think, in accordance with the decided cases, that the plaintiffs are not entitled to judgment non obstante veredicto ; but that such judgment must be reversed, and judgment given for the defendants.

Judgment reversed.

END OF HILARY VACATION.

# CASES

ARGUED AND DETERMINED

IN

## THE QUEEN'S BENCH,

IN

### Easter Term and Vacation,

VII. VICTORIA.

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The judges who usually sat in banc in this term and vacation were,  
Lord DENMAN, C. J. WILLIAMS, J.  
PATTESON, J. WIGHTMAN, J.

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#### MEMORANDA.

Lord ABINGER, Lord Chief Baron of the Court of Exchequer, died in last Hilary vacation, on the Norfolk circuit. In the same vacation,

Sir *Frederick Pollock*, her majesty's Attorney General, was appointed Lord Chief Baron, being first called to the degree of Serjeant at Law; when he gave rings with the motto *Jussa capessere fas est*:

And Sir *W. W. Follett*, her majesty's Solicitor General, was promoted to the office of Attorney General.

In this term, *Frederic Thesiger*, of the Inner Temple, Esquire, was appointed Solicitor General. He afterwards received the honour of knighthood.

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\*832] \*The following rule was read in this Court on April 24th in the present term.

#### REGULA GENERALIS.

† *Easter Term in the Seventh Year of the Reign of Queen Victoria.*

IT IS ORDERED that for the future it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon, but that it shall be requisite only to produce a satisfaction piece similar to that in use in the Court of Queen's Bench; except that in all cases such satisfaction piece shall be signed by the plaintiff or plaintiffs, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster,

expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece, before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney: but any judge at chambers shall have power to make an order dispensing with such signature of the plaintiff or plaintiffs, or their personal representatives, under special circumstances, as he may think right: and that, in cases where the satisfaction piece is signed by the personal representative of a deceased plaintiff, he shall prove his \*representative character in such a way as the Master may direct. [\*838]

(Signed)

DENMAN.

J. WILLIAMS.

N. C. TINDAL.

J. T. COLERIDGE.

FRED. POLLOCK.

T. COLTMAN.

J. PARKE.

T. ERSKINE.

E. ALDERSON.

R. M. ROLFE.

J. PATTESON.

WM. WIGHTMAN.

J. GURNEY.

C. CRESSWELL.

### HASLEHAM v. SAMUEL YOUNG and WILLIAM SAMUEL YOUNG.

Y. and S. were attorneys in partnership. S. gave an undertaking that, in consideration of the plaintiff in an action giving the defendant in that action his discharge from custody, "we hereby agree" to pay such plaintiff the debt and costs on a day named. S. signed this, "Y. and S. defendant's attorneys," but afterwards struck out the words "defendant's attorneys." It was not proved that the defendant had employed the firm, but only that S. had been employed by him to wind up his affairs; nor was any evidence given of recognition or knowledge by Y., or of authority from him to S., by previous practice or otherwise, to give such a guarantee.

*Held* that Y. was not liable on the guarantee.

**ASSUMPSIT.** The first count stated that, before and at the time of making the promise after mentioned, W. F. Dick was lawfully in custody under a ca. sa., sued out of the Exchequer by plaintiff against Dick; and thereupon afterwards, to wit, &c., in consideration that plaintiff, at the request of defendants, would give Dick his discharge from the said custody, defendants, by a certain memorandum in writing, then agreed to pay plaintiff, or his attorney G. W., on, &c., 99l. 11s., with interest, &c.: averment that plaintiff, confiding, &c., did then give his discharge from custody to Dick, who was then consequently discharged, &c.; of all which defendants had notice: that the time for paying was elapsed: and that no portion was paid by Dick or any \*other person. Breach: non-payment of principal or interest [\*834] by defendants. Second count on an account stated.

Plea, Non assumpsit. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after Easter term, 1843, the plaintiff produced a written guarantee, signed "Young and Son," and corresponding with the description of the promise

in the first count of the declaration. (a) The two defendants were father and son, attorneys, in partnership. The signature was in the son's writing. The signature was originally "Young and Son, defendant's attorneys;" but the son afterwards struck out the last two words.

It appeared that the son, whether on his sole account or on that of the firm was not shown, had been employed to arrange Dick's affairs, and get him out of custody; and that Dick's discharge had been obtained from the plaintiff by the son's giving the guarantee. There was no evidence of authority by the father to the son to give such an undertaking; nor was any proof offered of the course of business of the firm in this respect. It was

\*835] objected that the joint contract of the \*defendants was not proved.

The Lord Chief Justice reserved leave to move for a nonsuit, and directed a verdict for the plaintiff. In Trinity term, 1843, *Petersdorff* obtained a rule accordingly.

*Pearson* now showed cause. There was a sufficient authority, from the course of business, for either partner to give the guarantee in the name of the two. The two are attorneys: the consideration for giving the instrument was the release of Dick: and the whole was thus an act done in the course of the profession. This is not like the case of a negotiable instrument, as in *Hedley v. Bainbridge*, 3 Q. B. 316, where the Court said that "there is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business:" which also appears to have been the view taken by ALDERSON, B., in *Levy v. Pyne*, Car. & M. 453. The reason of the distinction is, that a negotiable instrument creates a contract with any person into whose hands it may come: and the powers of individual partners, therefore, require peculiar restriction as to such instruments.

*Petersdorff*, contra. In *Sandilands v. Marsh*, 2 B. & Ald. 673, a guarantee given by one of two partners in the name of the firm, in a partnership transaction, was held to be binding on both the partners, because the other partner, after he knew that the guarantee had been given, allowed the transaction to go on. But here no knowledge or privity on the part of the \*836] father is shown. Without \*such evidence the father cannot be bound; *Duncan v. Lowndes*, 3 Campb. 478. (He was then stopped by the court.)

(a) The following is a copy:

"In the Exchequer of Pleas.

JOHN HASLEHAM v. WILLIAM FOSTER DICK.

"In consideration of the plaintiff giving the defendant his discharge from custody in this action, we hereby agree to pay to the plaintiff, or his attorney, Mr. George Wright, the sum of 99l. 11s. (being the amount of debt and costs,) and subsequent costs herein, and interest on such debt, together with interest on such sum of 99l. 11s. from the date hereof, on the 9th day, of June, 1841, or such part thereof as shall not have been previously paid, the said defendant having also given his warrant of attorney for the amount, payable at six months from the date hereof. Dated this 9th day of June, 1840.

"Witness,

"Young and Son.

"GERVASE WILLIAMS,

"No. 9, Farringdon Street, City."

LORD DENMAN, C. J. This is quite a clear case. The guarantee was not given in the usual course of business: and it is remarkable that the son struck out the words "defendant's attorneys." But, even if the father had been attorney for Dick, he would not be bound by the son having given this undertaking, unless more were shown.

PATTESON, J. There is no evidence that the guarantee was given in pursuance of the ordinary practice of the parties; and certainly such a transaction is not in the usual course of the business of attorneys.

WIGHTMAN, J., (a) concurred.

Rule absolute

(a) Williams, J., was sitting at the Central Criminal Court.

### LE VEUX v. BERKELEY.

If a plaintiff be beyond seas at the time of the action accruing, he may sue, under stat. 21 J. 1, c. 16, s. 7, at any time before his return, as well as within the limited time after his return. *Seemle*, that an affidavit to be used on a motion in this Court cannot be sworn before a British consul abroad, under stat. 6 G. 4, c. 87, s. 20.

**ASSUMPSIT** for money lent and money had and received, for interest, and on an account stated.

Plea 4. That the causes of action in the declaration mentioned did not, nor did any or either of them, or any part thereof, accrue to plaintiff at any time within six years next before the commencement of this suit, in manner, &c. Verification.

\*Replication. That, at the time when the several causes of action in the declaration mentioned, and each and every of them, did accrue to the said plaintiff, he, the said plaintiff, was in parts beyond the seas, to wit, in the kingdom of France; and that the said plaintiff did not, at any time from the time that the said several causes of action accrued, or each and every of them accrued, until the commencement of this suit, come or return into this kingdom; but the plaintiff hath, from the time the said several causes of action accrued, and each and every of them did accrue, resided and been, and still resides and is, in parts beyond the seas, to wit, in the kingdom of France. Verification. [\*837]

Rejoinder. That plaintiff hath not, from the time when the said causes of action accrued, resided or been in parts beyond the seas, in manner and form, &c.; conclusion to the country. Issue thereon.

Several others in fact were joined.

On the trial, before LORD DENMAN, C. J., at the last Sussex assizes, a verdict was found for the plaintiff on all the issues.

*Platt* now moved in arrest of judgment. The replication to the fourth plea is no answer, because it does not show that the defendant had returned to England. Now stat. 21 James 1, c. 16, s. 7, gives liberty to bring the action, when the plaintiffs have been beyond the seas at the time of the

action accruing, only within the limited time after such defendants have "returned from beyond the seas." [WIGHTMAN, J. There is a direct authority against you, *Strithorst v. Graeme*, 2 W. Bl. 723, S. C., 3 Wils. 145, \*838] which is reported by Sir William Blackstone, but more fully by Wilson. The court, according to the latter, says: "If the plaintiff is a foreigner, (as it seems he his,) and doth not come to England in fifty years, he still hath six years after his coming into England, to bring his action; and if he never comes to England himself, he has always a right of action while he lives abroad." That case is in point, but appears inconsistent with the language of the statute.

*Per Curiam.* (a)

Rule refused. (b)

A rule was obtained on the following day, calling on the plaintiff to show cause why the verdict should not be reduced by deducting the amount given to the plaintiff exceeding five per cent. for interest. The rule was granted on reading the affidavit, among others, of Pierre Jules Baroche, as to the law of France respecting interest. The jurat was

"Sworn at Paris in the kingdom of France by the within named Pierre Jules Baroche on this 13th day of April, 1844. Before me, Her Britannic Majesty's consul at Paris.

THOMAS PICKFORD.

Mr. Hertslet, a sub-librarian of the Foreign Office in London,\* who had had in his custody the correspondence of the consuls with the Foreign Secretary, \*839] made affidavit verifying the consul's signature, and stating "that the \*said Thomas Pickford is by law a person empowered to take affidavits in the kingdom of France to be used in England." The only remaining affidavit certified the correctness of a translation annexed, of Baroche's affidavit; the body of which was in French. In this term (May 8th,)

*Thesiger* (with whom was *Ogle*) showed cause, and contended in the first instance that a consul had no authority to take an affidavit abroad. Mr. Hertslet's affidavit cannot establish the jurisdiction. Stat. 6 G. 4, c. 87, s. 20, (c) must be looked to; and that gives only such power as might be

(a) Lord Denman, C. J., Patteson and Wightman, J. Williams, J. was at the Central Criminal Court.

(b) See *Piggot v. Rush*, 4 A. & E. 912, and *Chandler v. Vilett*, (there cited,) 2 Wms. Saund. 120, 121 a, and notes (h), (k), 6th ed.

(c) Stat. 6 G. 4, c. 87, s. 20, is as follows: "And whereas it is expedient that every consul-general or consul appointed by His Majesty at any foreign port or place should in all cases, have the power of administering an oath or affirmation whenever the same shall be required, and should also have power to do all such notarial acts as any notary public may do; he it therefore enacted, that from and after the passing of this act it shall and may be lawful for any and every consul-general, or consul appointed by His Majesty at any foreign port and place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port or place all and every notarial acts or act which any notary public could or might be required, and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit or affirmation, and every such notarial act, administered, sworn, affirmed, had or done by or before such consul-general or consul, shall be as good, valid and effectual, and shall be of like force

exercised by an authority "of the like nature" with that of a justice of peace or notary: and they could not receive depositions in a matter of this kind. In *Pickardo v. Machado*, 4 B. & C. 886, this court was equally divided on the question whether a British vice-consul abroad could take an affidavit to hold to bail. The Court of Common Pleas, *In re Barber*, 4 Dowl. P. C. 640,<sup>(a)</sup> seems to have been of opinion that a consul had jurisdiction under the statute in the case of an affidavit verifying the certificate of acknowledgment of a fine by a married woman. But the words "legal or competent authority of the like nature," do not support such a ruling. [\*840]

*Platt and Peacock*, contra. Before stat. 6 G. 4, c. 87, an affidavit made abroad would have been sworn before the local magistrate, and his signature verified. The object of this act was to increase the number of persons competent to take affidavits, whenever they might be required, and to provide an officer bound in duty (which the foreign magistrate was not) to receive them. "Authority of the like nature," means of the same nature with that of the magistrates who previously took affidavits. In *Pickardo v. Machado*, 4 B. & C. 886, two judges of this court thought the affidavit admissible. [Lord DENMAN, C. J. In *Ex parte Lady Hutchinson*, 4 Bing. 606,<sup>(b)</sup> the caption of the acknowledgment of a fine was sworn to before a British consul at Boulogne, and, on motion that the fine might pass, the Court of Common Pleas held the affidavit insufficient, the consul having only the same authority as a magistrate in England.] If the court think this affidavit inadmissible, the defendant will pray for time to obtain a further deposition. [PATTESON, J. The case *In re Barber* is nothing. The Court of Common Pleas there assume that the consul did nothing more than might have been done by a notary.] [\*841]

Lord DENMAN, C. J. I do not feel warranted in saying that the Common Pleas were wrong in *Ex parte Lady Hutchinson*. But we will grant the application for time.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

*Thesiger* then consented to show cause on the affidavits as they stood: and the rule was Discharged.

and effect, to all intents and purposes, as if any such oath, affidavit or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had or done before any justice of the peace or notary public, in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

(a) See S. C. 2 New Ca. 268.

(b) Cited in *In re Barber*, according to the report of that case in 2 New Ca. 268.

## DOE on the demise of Sir CHARLES M. L. MONCK, Bart., v. GEEKIE and BEVERIDGE.

Defendant being tenant from year to year at a given rent, the rent was raised, at the termination of one of the years, by consent of landlord and tenant. *Held*, that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain, from the time of raising the rent, could not be inferred, (in default of additional evidence,) even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain.

EJECTMENT for land, &c., in Northumberland. On the trial, before ROLFE, B., at the Northumberland Spring assizes, 1844, it appeared that the lessor of the plaintiff let the land, &c., in question to the defendants for one year from the 12th of May, 1840, at a rent of 240*l.* per annum. The defendants entered on the premises, and continued in possession after the year. On 12th May, 1842, the rent was increased by 2*l.* a year. No evidence was given as to the circumstances under which the change took place. Notice to quit was \*afterwards given; after which, and before this ejectment was brought, part of the increased rent was paid by the defendants. The notice was to quit on 12th May, 1843.

It was objected, at the trial, that the notice was premature, for that the addition to the rent made in May, 1842, created a new contract of tenancy, which therefore could not be determined before May, 1844. The learned judge overruled the objection. Verdict for plaintiff.

Udall now moved for a new trial, on the ground of misdirection. The additional rent was proof of a new tenancy. *Doe dem. Bedford v. Kendrick*, MS., Adams on Ejectment, 144, (3d ed.,) a Nisi Prius case decided in 1810, is indeed the other way, but is contrary to later cases decided in banc, *Stead v. Dawber*, 10 A. & E. 57, and *Marshall v. Lynn*, 6 M. & W. 109, which overrule *Cuff v. Penn*, 1 M. & S. 21. The contract here is as completely new as if an alteration had been made in the day on which the year of tenancy was to begin. Then, if there was a new tenancy, it would be from year to year, which is a tenancy for two years at least; *Doe dem. Chadborn v. Green*, 9 A. & E. 658, where the authorities are discussed in a note at the end of the case, 9 A. & E. 661, note (d). (a)

LORD DENMAN, C. J. This may have been a new contract; but its terms must have been understood to \*be that all was to go on as under the old contract, except as to the amount of rent. That is the common sense view of the transaction.

PATTESON, J. *Doe dem. Bedford v. Kendrick*, (b) appears to be a direct authority.

WIGHTMAN, J., (c) concurred.

Rule refused.

(a) See also *Doe dem. Clark v. Smaridge*, Q. B., Trin. Vac. 1845, where it was decided that a "tenancy from year to year, so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions showing that they contemplate a tenancy for two years at the least."

(b) MS. Adams on Ejectment, 144, (3d ed.)

(c) Williams, J., was at the Central Criminal Court.

## The QUEEN v. The Inhabitants of HIGH BICKINGTON.

Reported, 3 Q. B. 790, note (a).

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## The QUEEN v. The Inhabitants of BEDINGHAM.

Reported, *antè*, p. 653.

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## The QUEEN v. The Justices of SURREY.

Reported, *antè*, p. 506.

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## \*MARY EVANS v. GWYN, Clerk, and WILLIAMS, Clerk. [\*844

When a suit is instituted in the Spiritual Court for defamation, and the defamatory words are libelled as forming one article of charge, and the sentence appears, on the face of it, to have proceeded upon all the words complained of, a prohibition will go if part of the words contain imputations for which an action at common law would lie, though other parts contain matter which is properly of ecclesiastical cognisance.

If there be a rule that in cases of defamation the Spiritual Courts have concurrent jurisdiction with the temporal where a spiritual person is aggrieved, it applies only where the party is affected in his ecclesiastical character. Not, therefore, where a clergyman is defamed as having indecently assaulted a woman on the highway.

PROHIBITION. (a) The declaration set forth a citation issued by the deputy registrar of the Consistory Court of the diocese of St. David's, under the seal of the Vicar General, in the name of the Bishop, citing Mary Evans, the now plaintiff, to appear in the said court, to answer the now defendant, the Reverend Thomas Bevan Gwyn, in a certain cause of defamation and slander. The declaration further stated that the now plaintiff appeared, and Gwyn exhibited his libel against her in the said cause, which was then set forth. The material parts were as follows.

That all persons who utter, publish, &c. reproachful, scandalous or defamatory words, to the reproach, hurt and diminution of the good name and reputation of any other person, contrary to good manners and the bond of charity, are and ought to be monished, constrained and compelled to the reclaiming and retracting such reproachful, &c. words, to the restoring of the fame and reputation of the person thereby injured, and that for the future they refrain from uttering, &c. any such reproachful, &c., and are and ought to be canonically \*corrected and punished, &c. That, notwithstanding the premises, the said Mary Evans, single woman, did, in the months, &c., within the parish, &c., and within the jurisdiction of this court, "in an angry, reproachful, malicious and invidious manner, several

(a) A prohibition was moved for in the Bail Court, and cause shown, Hil. T. 1843; when Williams, J., enlarged the rule for a prohibition in order that the now plaintiff might declare. *Ex parte Mary Evans*, 2 Dowl. P. C., N. S. 726. [\*845

times or at least once, in the presence and hearing of divers credible persons who then and there understood the Welsh language, defame the said Rev. T. B. Gwyn, the said party agent, who was and is a person of good reputation and character, and charged him, the said Rev. T. B. Gwyn, with intoxication and indecency; and, speaking of and meaning and intending the said Rev. T. B. Gwyn, said, affirmed and published several times, or at least once, certain scandalous, opprobrious and defamatory Welsh words, that is to say" (the words were then set out in Welsh;) "which said several Welsh words," &c., "being translated into the English language, have, in their ordinary interpretation, the following sense and meaning, that is to say: 'What time did your master come home last night? was he sober? the blackguard was drunk; he must have been.' " Other Welsh words were then stated: "which said several Welsh words," &c., "being translated," &c., "have, in their ordinary interpretation, the following sense and meaning, that is to say; that 'he, on the night before, on his way from Carmarthen, overtook me on the high road, and attempted to throw me and my horse into the ditch; also put his hand under my safeguard, and then shoved it up under my petticoat until it reached my knee. I struck him with my whip and galloped off;' and words of the like tenor or effect, tending to injure the good name, fame and reputation of him the said Rev. T. B. Gwyn; and meaning, by such words, among other things, that on \*846] \*the said occasion the said Rev. T. B. Gwyn was not sober, and that he wanted to violate the person of her the said Mary Evans, or that he otherwise conducted or wanted to conduct himself indecently and incontinently towards her." The libel further alleged "that by reason of the speaking the said defamatory words, the good name, fame and reputation of the said Rev. T. B. Gwyn is much hurt and injured among his neighbours, friends, acquaintance and others:" that Mary Evans is subject to the jurisdiction of the court; and that the Rev. T. B. Gwyn hath rightly and duly complained, &c.

The declaration went on to state that Mary Evans pleaded negatively to the libel, and that the cause came on for hearing before the now defendant, the Rev. David Archard Williams, as the presiding judge; "whereupon the said Consistory Court proceeded to examine into the truth of the said libel by the examination of witnesses; whereby it did appear to the said Consistory Court that the said libel was proved: and the said Rev. D. A. Williams, as such Judge and the presiding surrogate of the said Consistory Court, proceeded to make a decree.

The decree, after certain recitals, proceeded: "I have thought fit, and do thus think fit, to the giving due definitive sentence or final decree in this cause, in manner and form following, that is to say: Forasmuch as, by the acts enacted, deduced, alleged, exhibited, propounded, proved and confessed in this cause, I have found, and it doth evidently appear unto me, that the proctor for the said The Rev. T. B. Gwyn hath fully and sufficiently proved his intention deduced in a certain libel and other pleadings

given in, exhibited and \*admitted on his behalf, and now remaining in the registry of this court, which libel, other pleadings and exhibits, I take and will have taken as if here read and inserted, for me to pronounce as hereafter is pronounced, and that nothing, at least nothing effectual, hath on the part and behalf of the said Mary Evans been excepted, deduced, exhibited, pronounced, proved or confessed in the cause, which may or ought in any wise to defeat or weaken the intention of the said The Rev. T. B. Gwyn: Therefore I, the said D. A. Williams," &c., "do pronounce, decree and declare that the said Mary Evans did, in the years, months and place in the said libel mentioned, or some or one of them, contrary to good manners and the bond of charity, publicly and maliciously, in an angry, reproachful and invidious manner, defame the said The Rev. T. B. Gwyn, and maliciously say, publish and report several scandalous, reproachful and defamatory words in the said libel mentioned, and tending to the infamy and diminution of the estate, good name, fame and reputation of the said The Rev. T. B. Gwyn: wherefore I pronounce, decree and declare that she the said Mary Evans ought to be duly admonished, and I do hereby admonish her, for her so great excess and rashness in the premises, and do enjoin her, under the pains and punishment provided by the canonical laws of this realm, that she abstain from such defamatory words in future. And I do also pronounce, decree and declare that the said Mary Evans ought to be, and I do condemn her in lawful costs to be paid by her, the same being first taxed by the registrar; and which costs I pronounce shall be paid to the said The Rev. T. B. Gwyn, or to his proctor on his behalf."

The declaration concluded: "And hereupon the said \*Mary Evans, inasmuch as it appears in and by the said libel and allegation, and other proceedings hereinbefore set forth, that the said Consistory Court hath no lawful power or jurisdiction over the said cause, or to make or enforce the said decree, humbly prays," &c. Prayer of a prohibition, to prohibit the judge, &c. from further holding plea or proceeding in the Spiritual Court before him, &c. in the said cause, or in any manner touching the premises.

General demurrer and joinder.

Bovill for the defendants in prohibition. A prohibition may be sued for after sentence, if the Spiritual Court has acted without jurisdiction: but the party seeking to prohibit must show, by the proceedings themselves, that the Court had no cognisance of the cause; *Full v. Hutchins*, 2 Cowp. 422; where a prohibition was refused because the Spiritual Court had cognisance of the cause, though in the course of it they had instituted an inquiry to which their jurisdiction did not extend. The rule appears also from *Churchwardens of Market Bosworth v. The Rector of Market Bosworth*, 1 Ld. Ray. 435; and *Stainbank v. Bradshaw*; note (c) to *French v. Trask*, 10 East, 349. And in *Hart v. Marsh*, 5 A. & E. 591, after sentence in the Spiritual Court for offences, some of ecclesiastical cognisance and some cognisable

in the common law courts, this court refused a prohibition, it not appearing that the sentence had proceeded upon the latter. The same doctrine was recognised in *Carslake v. Mapledoram*, 2 T. R. 473. The words in question may be considered as if they were before this court in a case of

\*849] \*written slander; for, in the Ecclesiastical Courts, "where the words used are clearly defamatory, it is immaterial whether they are in writing or used orally;" Rogers's Ecc. Law, 295. Some of the expressions on which this sentence has proceeded are not so stated that they would support an action for written libel; and this is sufficient to defeat a suit in prohibition, though the court of common law will not say that the statement is too loose to bear out an ecclesiastical sentence; that being a point, not of jurisdiction, but of the practice in the Spiritual Court, which cannot be determined here; *Ex parte Smyth*, 3 A. & E. 719. It appears by *Cole v. Corder*, 2 Phill. Ecc. Rep. 106, that great precision in the setting out and proof of defamatory words is not required by the ecclesiastical courts. The complaint in the present case was, substantially, that Mary Evans "charged him, the said Rev. Thomas Bevan Gwyn, with intoxication and indecency." The whole language, as set forth in detail by the libel, may not have been proved: and the libel, after stating some of the expressions complained of, adds: "and words of the like tenor or effect:" the sentence, therefore, may have been grounded on words uttered with the intention to make the specified charges; but the particular expressions on which it will be said that a common law action would lie may not have been proved. As to the individual charges, it does not appear that the reproach conveyed by the term "blackguard" may not have been cognisable in the spiritual courts. The jurisdiction of those courts over the offence of drunkenness is expressly saved by stat. 4 Ja. 1, c. 5, s. 8, referred to on this point

\*850] in Rogers's Eccl. Law, \*296. And the imputation of indecency would not of itself be ground for an action at common law. It is true that the libel adds words of interpretation, which represent the expressions of Mary Evans as ascribing to Mr. Gwyn the intention to violate or to act incontinently; but the former suggestion is not borne out by the words, nor consistent with the prior averment, that Mary Evans charged Mr. Gwyn merely with indecency. As to the intention "to act incontinently," this court will not assume, from such an expression, that something amounting to a common law offence was charged; *Sweetapple v. Jesse*, 5 B. & Ad. 27. [Lord DENMAN, C. J. There the words, if taken without any additional matter, were wholly innocent.] *West v. Smith*, 4 Dowl. P. C. 703, is another similar case. The conduct here imputed does not so necessarily import an assault which the courts of common law would notice, that the Spiritual Court must be deemed to have taken cognisance of such an assault. [WIGHTMAN, J. The libel fixes that construction upon the conduct described; for it says "meaning," "among other things, that" "the said Rev. T. B. Gwyn was not sober, and that he wanted to violate," &c.] The libel adds, "or that he otherwise conducted himself," &c. The

Ecclesiastical Court may have a jurisdiction concurrent with that of the common law courts, the one correcting *pro salute animæ*, the other restraining a temporal wrong; and in such cases a prohibition ought not to go; Rogers's Ecc. Law, 715, 716. One of these is drunkenness. In the case of indecency, the Spiritual Court seems to have a sole jurisdiction. Again, where an offence affects a spiritual person in that character, the Ecclesiastical Court will, on that account, correct the \*offender, *pro salute animæ*, though the common law may give a remedy to the party injured for his temporal loss; Rogers's Ecc. Law, 716, citing 2 Inst. 622, where it is said that, "if one lay violent hands of a clerk, the spiritual judge, *pro salute animæ*, shall enjoin him penance, and the clerk may have his action of battery, and recover damages for the injury done to him;" and citing also the language of this court in *Roberts v. Pain*, 3 Mod. 67, where they compared the case before them "to that of a drunkard or ill liver, who are usually punished in the ecclesiastical courts, though a temporal loss may ensue." In 6 Bac. Abr. 596, 7th ed., *Prohibition*, (L) 5, it is said: "The ecclesiastical courts have in some instances a concurrent jurisdiction with the temporal courts; as, in laying violent hands on a clerk, a pension by prescription, &c. So that, if a clergyman be beaten, an action at law lies for the battery; as also a suit in the Spiritual Court for irreverence to his character. But such proceedings in the Ecclesiastical Court must be *pro salute animæ*." Where the object of the proceeding is deprivation, the Spiritual Court may try, though a temporal offence be in question; as was held in the case of a layman who had forged orders and obtained a benefice; *Slader v. Smalbrooke*, 1 Lev. 138. [PATTESON, J.—It is said that prohibition lies against a suit in the Spiritual Court for calling a woman "whore" in London; that is, because the words are actionable there.(a)] In *Evans v. Brown*, 2 Ld. Raym. 1101, a suit was brought in the Ecclesiastical Court for words charging incontinence, and a prohibition refused, though the complainant had brought an action \*at law for the same words, grounded on special damage. According to all the authorities, the Ecclesiastical Courts have a concurrent jurisdiction with the civil where a spiritual person is aggrieved. *Cranden v. Walden*, 3 Lev. 17, was a case of "prohibition for saying of a parson, 'He preaches nothing but lies and malice in the pulpit;' for these words are actionable at common law;" to which point *Drake v. Drake*, 1 Roll. Ab. 58, *Action sur Case*, (T) pl. 2, was cited; but a consultation was granted. [PATTESON, J.—The words there were spoken of the complainant in his character of a clergyman. The report says a "consultation was granted; for it concerning an ecclesiastical person and an ecclesiastical matter, 'tis fit to be tried there."]

*E. V. Williams*, contra. Prohibition lies after sentence, if an original want of jurisdiction appear by the proceedings; Com. Dig. *Prohibition* (1); 3 Burn's Ecclesiastical Law, 398,(b) *Prohibition*, IV.: though not if the objection be grounded on some matter arising in the course

(a) See Com. Dig. *Prohibition*, G. 14.

(b) 9th ed. By Phillimore.

of the suit; *Argyle v. Hunt*, 1 Stra. 187. To ascertain whether the Ecclesiastical Court has jurisdiction or not in a case of defamation, the test is whether that court would or would not have had exclusive jurisdiction over the subject-matter of the defamatory words. In *Harris v. Buller*,<sup>(a)</sup> Sir W. WYNNE said, in the Court of Arches: "I hold it to be an incontrovertible principle, that only such defamatory words are cognisable here, which impute an offence which would be punishable here." "It is not sufficient merely that the words impute an ecclesiastical offence, it must be  
 \*853] an offence also which will not be punishable at common law."

And in Com. Dig. *Prohibition*, (G. 14,) it is said: "So, by the St. Circ. Agat., 13 Ed. 1, stat. 4, the Court Christian shall hold plea for defamation, when damages are not demanded. Where the defamation charges a crime merely spiritual; as, if the libel be, that the defendant called him heretic, schismatic." In 2 Burn's Ecc. Law, 126, *Defamation*, it is laid down that "Words which impute an offence cognisable in a spiritual court, may be punished in that court. But three incidents are required in a suit for spiritual defamation: 1. That it concern matter merely spiritual, and determinable in the Ecclesiastical Court, as calling a person 'heretic, schismatic, adulterer, fornicator, &c.;' 2. It ought to concern matter merely spiritual only, for if such defamation touches or concerns any thing determinable at the common law, the ecclesiastical judge shall not have cognisance of it. 3. He who is defamed cannot sue there for amends or damages, but only for the punishment of the sin, *pro salute animæ*, and for costs." This doctrine has never been shaken, and is supported by the decisions; *Hollingshead's Case*, Cro. Car. 229; *Lockey v. Dangerfield*, 2 Stra. 1100. [Lord DENMAN, C. J. In Com. Dig. *Prohibition*, (G. 14,) it is said that the Court Christian shall hold plea of defamation when damages are not demanded, "though the words import a spiritual crime, which in some respect is punishable by the common law, if the spiritual jurisdiction is not taken away; as, if he says, A. *keeps a bawdy-house*; for though it be indictable, the Spiritual Court has a concurrent jurisdiction."]

That is against the general course of authorities. If words actionable at law be mixed with the words charging "a mere spiritual offence, the  
 \*854] Ecclesiastical Court cannot proceed: "as, if he says, *you are a whore and thief*:" Com. Dig. *Prohibition*, (G. 14.) "If" "words for

which an action would lie are coupled with words which are a spiritual defamation, and a suit is instituted in the Spiritual Court for the whole, a prohibition lies; also if it be suggested to the court that a temporal damage has been received from words which are a spiritual defamation, or that other words for which an action would lie were coupled with them; for it would be vexatious to proceed in both courts:" 2 Burn's Ecc. Law, 126, *Defamation*. [Lord DENMAN, C. J., Fitz. N. B. 53 A. (tit. *Consultation*), seems to show a circuitous way of recovering damages in the Spiritual Court.] In 2 Burn's Ecc. Law, 127, it is laid down that the Spiritual

(a) Note to *Crompton v. Butler*, 1 Hag. Cons. Ca. 463, 464.

Court may try "when money is not demanded;" "for in this case, he that is defamed cannot sue there for amends or damages, but only for correction of the sin:" and at p. 128, it is said that the defamation must not be "for matters spiritual mixed with temporal;" to which point authorities are cited. In *Carslake v. Mapledoram*, 2 T. R. 473,(a) where the words charged a woman with being common and having had a contagious disease, a prohibition was refused, because the imputation of having had a disease was no ground of action; had this been otherwise, a prohibition would clearly have issued. The sentence here premises that "The Rev. T. B. Gwyn hath fully and sufficiently proved his intention deduced in a certain libel," &c. The libel contains only one article setting out words, and those appearing to be spoken on a single occasion: and the judge in his sentence [\*855] goes on to pronounce that the said Mary Evans did "say, publish and report several scandalous, reproachful and defamatory words in the said libel mentioned, and tending to the infamy," &c. "Several" there must mean the several words set out in the single article referred to; it cannot be taken to mean "several of" the words; and there can be no ambiguity as to the words which are alluded to. The case differs in this respect from *Hart v. Marsh*, 5 A. & E. 591, where there were many distinct articles, and some appeared to have been proved and others not. Here the Spiritual Court must have adjudged on matter beyond its jurisdiction; if that conclusion could be avoided in the present case, it must follow that, wherever any charge of a spiritual offence was mixed with matter of temporal charge, this court could have no power to prohibit. The general assumption of an authority in the Spiritual Courts, concurrent with that of the temporal, to punish for defamation, is not borne out by the passage cited from Burn's and Rogers's Ecclesiastical Law. That the imputation of drunkenness, even against a clergyman, would not be punishable in the Spiritual Court, unless it reflected upon him in the discharge of his official duties, may be inferred from *Cucko v. Starre*, Cro. Car. 285, where it was held that merely saying of a man "thou art a drunkard," was not an offence cognisable by that court.

*Bovill*, in reply. The ecclesiastical jurisdiction as to drunkenness being preserved by stat. 4 Ja. 1; c. 5, s. 8, the imputing of that crime was at least one matter, stated in the libel, of which the Spiritual Court might [\*856] take cognisance. The plaintiff in prohibition must argue that the expression "several scandalous, reproachful, and defamatory words in the said libel mentioned," means all the scandalous words there mentioned; but this is not the natural construction. "Several" means part of the words; proof of part would authorize the sentence, as the like proof, on a common law information, would warrant a verdict of guilty. The judgment of ASHHURST, J., in *Carslake v. Mapledoram*, 2 T. R. 473, is express upon the point that, if the Spiritual Court "had a jurisdiction as to part of the charge," the other part might be overlooked in deciding as to

(a) See *Blodworth v. Gray*, 7 Man. & G. 334.

a prohibition. And BULLER, J., says that, after sentence, if the jurisdiction be only doubtful, a prohibition ought not to go.

LORD DENMAN, C. J. This is a suit instituted to prohibit the Ecclesiastical Court from further proceeding in a cause of defamation. The words complained of in the Spiritual Court are these. (His lordship read the words as charged in the libel.) A material and distinct part of the imputation here is, that the complainant in the Spiritual Court not only wanted to violate the person of Mary Evans, but made an attempt of that kind, which is an offence cognisable by the temporal courts, and the imputation of which by words is actionable. Now it appears to have been the law from the earliest time, that defamation, under these circumstances, is not cognisable by the Spiritual Court. It is so laid down in Fitzherbert; (a) and, in Com. Dig. *Prohibition*, (G. 14,) it is said that, “if a libel be for words which are  
 \*857] actionable, a prohibition goes; as, if they charge with felony:” and, afterwards, “If part of the words be actionable, a prohibition goes for the whole, though the others charge with a spiritual crime; as, if he says, *you are a whore and thief*:” for which *Mellet v. Herbert*, 1 Sid. 404, is cited. It follows that in the present case a prohibition might have gone if applied for at the commencement of the suit: the question is whether it can be granted now that sentence has passed: and that depends upon another question,—whether we can consider the sentence as passed for all the words set out in the libel, or for part of them only. The language of the sentence is, “that the said Mary Evans did” “maliciously say, publish and report several scandalous, reproachful and defamatory words in the said libel mentioned, and tending to the infamy and diminution of the estate, good name, fame and reputation of the said The Rev. T. B. Gwyn;” whereupon the judge pronounces that she ought to be admonished, and admonishes her, for her so great excess and rashness in the premises, and enjoins that she abstain from such defamatory words in future, &c. The whole really turns on the construction of the word “several.” If there had been in this case distinct articles of charge, as in *Hart v. Marsh*, 5 A. & E. 591, some of which were proved and others not, we might apply the sentence distributively, and take those words as proved for which the sentence might be passed. But there is not such a force in the word “several,” here, as enables us to make that kind of distribution. No distinction is made among the words referred to: “several scandalous,” &c., “words in  
 \*858] the said libel mentioned,” does not exclude any. It is not as if the judge had said “several of the scandalous” words. The sentence clearly proceeds upon the statement of all; among the rest, therefore, those of which the Spiritual Court could not take cognisance. The comity of courts in respecting each other’s sentences is grounded on a supposition that they will act only according to their powers: but, if the proceeding now in question were held good, courts might give themselves jurisdiction over any thing by coupling that which was out of the jurisdiction with

(a) See Fitz. N. B. 53 F, H, tit. *Consultation*.

something within it. I am of opinion that the sentence here applies to the whole of the words, and improperly does so : and our judgment, therefore, must be for the plaintiff.

PATTESON, J. It is argued for the defendants in prohibition that the words themselves, of which the libel complains, charge nothing beyond drunkenness and indecency. But they charge an act done, amounting to an assault, and for which an indictment would lie : and, consequently, an action at common law would lie for the words. But then it is suggested that there were other words, and the sentence may have proceeded upon them. And it is true that, if the sentence had proceeded upon part only of the words, and those properly of ecclesiastical cognisance, a prohibition would not have lain. But the word "several" cannot so confine the sentence ; it would be too much to give that effect to an accidental omission of the article "the ;" for I cannot but think that the form of words used is to be so accounted for. They are, as it appears to me, a finding that all the words mentioned in the libel were spoken ; and, if so, the case of a charge proved in part \*does not apply. Then the question arises [\*859 whether a prohibition can be awarded in this stage of the suit. But *Full v. Hutchins*, 2 Cowp. 422, decides this. There the libel was for tithes. A modus and customs were set up in defence ; and the Ecclesiastical Court inquired into these, and gave sentence ; after which a prohibition was moved for ; but this court refused it, on the ground that the point improperly tried had arisen incidentally in the cause, the Spiritual Court having jurisdiction over the principal matter : but they said, if it had appeared on the face of the libel that the court had no jurisdiction of the cause, a prohibition must have been granted, though after sentence. In the present case it does appear by the libel that the Ecclesiastical Court had not jurisdiction. It is argued, however, that in some instances the Ecclesiastical Court has concurrent jurisdiction with the civil. If it were necessary to consider the case cited to this point from 3 Levinz,(a) I should desire more time ; but that case and the present are not the same. There the libel complained of words spoken against a clergyman in the exercise of his office ; and that circumstance was relied upon as creating a distinction. The matter of the scandal, as well as the person affected, was ecclesiastical. Here the person is so, but the matter is not. The case cited does not prove the concurrent jurisdiction relied upon, except where a spiritual person, as such, is aggrieved : nor do I find any that does ; and the cases in *Burrow and Wilson*,(b) where a prohibition was considered to lie against a suit for calling a woman "whore" in London, and "strumpet" in Bristol, raise a very [\*860 strong argument against the supposition.

WILLIAMS, J. It was scarcely contended at the bar that a prohibition might not go after sentence, if the Spiritual Court appeared by the proceed-

(a) *Cranden v. Walden*, 3 Lev. 17.

(b) See *Theyer v. Eastwick*, 4 Bur. 2032 ; *Power v. Shaw*, 1 Wils. 62 ; Com. Dig. *Prohibition*, (G. 14.)

ings to have acted without jurisdiction : but the case was compared to *Hart v. Marsh*, 5 A. & E. 591 ; and it was said that, where the libel contained some matters which were, and some which were not, cognisable in the civil courts, it lay on the party impeaching the sentence to show that the Ecclesiastical Court had adjudicated on subjects beyond its jurisdiction. Then, has that court here proceeded upon words importing a common law offence ? It clearly has : for the words stated in the libel imply an assault of some kind. The point which alone created some difficulty was, whether the words could be severed so as to confine the sentence to that which was matter of spiritual jurisdiction : but I think it clear that, taking the libel and the sentence together, we must conclude that the whole of the words formed the foundation of the sentence. It is contended that the word "several" denotes a part only of the words charged ; but the words in the earlier portion of the sentence are, "I have found" "that the proctor for the said The Rev. T. B. Gwyn hath fully and sufficiently proved his intention deduced in a certain libel and other pleadings given in, exhibited," &c. "Intention," there, does not mean, in the ordinary sense, "animus ;" (a) the sense \*861] "is, that the whole ground of charge has been made out ; that is, that the whole of the words have been proved. If so, the Ecclesiastical Court has given judgment on one part of the case over which it had no jurisdiction.

WIGHTMAN, J. It is clear that the ecclesiastical courts in general have not concurrent jurisdiction with the civil ; though it is an excepted case from the rule, where the words libelled relate to a spiritual matter and person. Mr. *Bovill* does not dispute that the words here raise some imputation for which an action at law would lie : but he argues that the charge of defamation may be limited to matter which is of spiritual cognisance exclusively by the innuendo ; "meaning by such words, among other things, that on the said occasion the said Rev. T. B. Gwyn was not sober, and that he wanted to violate the person of her the said Mary Evans, or that he otherwise conducted or wanted to conduct himself indecently and incontinently towards her." But, supposing that an innuendo could have the effect contended for, the language relied upon purports only to give a part of the meaning. Again, it is suggested that the sentence convicts Mary Gwyn only of speaking "several," not "the several," defamatory words mentioned in the libel, and therefore it may be taken that the judgment proceeds on some of the words only, and those of ecclesiastical cognisance. But I think, taking the expressions in the ordinary sense, it must be understood that all the words mentioned in the libel were proved. And, if the sentence proceeded upon all, and some were of temporal cognisance, a prohibition \*862] ought to go, "according to the authorities cited in argument, and an anonymous case in 3 Mod. 74, which was not referred to.

Judgment for plaintiff.

(a) Some discussion took place as to this word during the argument. *E. F. Williams* pointed out that it meant "intentionem litis," the complaint ; as in the Roman law.

**The QUEEN v. The Mayor, Aldermen and Burgesses of GLOUCESTER.**

Under stat. 5 & 6 W. 4, c. 76, s. 92, the fees of a clerk to justices of a borough, for business done in respect of persons apprehended by the police and brought before the justices, or in respect of informations and other proceedings taken by and at the instance of the police, must be paid out of the borough fund (if they cannot be obtained from the individuals who ought to pay them) as expenses "necessarily incurred in carrying into effect the provisions" of that act. And the court, in such case, will grant a mandamus to enforce payment.

On motion for such mandamus, it being suggested that a retrospective rate might be necessary, the court nevertheless made the rule absolute, leaving the defendants to allege that fact, if it existed, and discuss its effect, on a return.

A RULE was obtained in last Michaelmas term, calling upon the Mayor, Aldermen, and burgesses of Gloucester to show cause why a mandamus should not issue, commanding them to pay to Samuel Commeline, out of the borough fund, the sums of 44*l.* 8*s.* and 83*l.* 18*s.* 6*d.*, mentioned in his affidavit on which the rule was obtained, and due to him in respect of expenses incurred in carrying into effect the provisions of stat. 5 & 6 W. 4, c. 76. The following, among other facts, appeared on affidavit in support of the rule.

The city of Gloucester is a borough named in sched. (A.) of stat. 5 & 6 W. 4, c. 76, and has a commission of the peace, and, by grant from King William IV., a separate court of quarter sessions. Mr. Commeline was appointed clerk to the justices of the borough in April, 1836. In January, 1839, a table of the fees to be taken by such clerk was made by the town council; and this was confirmed and allowed by the Home Secretary, stat. 5 & 6 W. 4, c. 76, s. 124. The council, in pursuance of \*the act, [\*863 established a watch committee; and the committee appointed constables or policemen, and instructed them to bring before the justices of the borough all offenders whom such constables, &c. might, in the discharge of their duty, apprehend. Mr. Commeline, in his affidavit, stated "that, in consequence of charges made, and informations laid, by the constables or police, and other the public municipal business of the said borough done and transacted by this deponent in his capacity of clerk to the justices of the said borough, as aforesaid, during" the years 1840-1841, and 1841-1842, "certain fees have, according to the aforesaid table, become due to this deponent as clerk to the justices of the said borough as aforesaid;" of which fees, comprised in two bills, he added particulars, and claimed (after giving credit for fines or penalties received by him, and a payment of 54*l.* 15*s.* made him by the council on account of his first bill) the two sums mentioned in the rule. And he deposed: "That he, this deponent, has, in his said bills, charged the town council with those fees only which have been incurred and become payable by and for business done at the instance of the police of the said borough, with regard to persons apprehended by the said police, and brought before the said justices, or with regard to informations and other summary proceedings taken by and at the instance of the

said police, and of which fees he could not otherwise obtain payment, either because they became payable upon convictions and other proceedings under acts of parliament which do not impose the payment of the expense attending the conviction or proceedings upon the person convicted or proceeded against, or upon any person specifically, or because \*they became

\*864] payable upon convictions of, or other proceedings against, persons who were wholly unable to pay any part of the expenses attending such convictions and proceedings. That in both cases the paper and forms necessary to such proceedings have been supplied by this deponent, and the expense of purchasing them defrayed by him. And this deponent has no means of obtaining payment of any of his said fees, or of obtaining reimbursement of the expenses he has incurred by reason of the said convictions or proceedings, or any compensation for his labour in reference thereto, unless such payment, reimbursement and compensation can be obtained by him out of the borough fund of the said borough, which this deponent believes is amply sufficient for that purpose. And this deponent says that the several persons so convicted and proceeded against, and with reference to whom charges are made in the said bill, were persons necessarily and unavoidably brought by the constables before the magistrates in the execution of their duty, and that their cases were thereupon necessarily disposed of by the magistrates, and could not have been so without the performance of the labour, and incurring of the expense, by this deponent, in respect of which the several fees in that behalf charged in the aforesaid bills are claimed by this deponent." He further stated that, for a considerable time after his appointment, fees of the kind now in question were duly paid him by the town council out of the borough fund, such payment (where not secured by the summary decision of the magistrates) being sanctioned by a resolution of council passed in December, 1837; but that, on his demanding payment of the present bills, a discussion arose,

\*865] and proceedings were had, in the \*town council and otherwise, all which were detailed in the affidavit, and which ended in a virtual refusal by the corporation to pay the sums now claimed. Payment of them was likewise demanded of the watch committee, and refused. Mr. Comeline stated "that the principal part of his duties as clerk to the justices as aforesaid arises out of informations laid and charges made by the police of the said borough, and warrants, commitments and convictions granted and made thereon, and from other the business transacted by the said deponent for the benefit of the said borough. And that this deponent incurs considerable outlay in transacting the public business of the said borough, by reason that he is obliged to furnish, at his own expense, stationery and all forms and documents necessary in transacting such business. And "that, with very few exceptions, all the persons against whom informations are laid or charges are made by the police are wholly unable to pay the fees which this deponent claims, in respect of the several matters giving occasion for them."

Several justices of the borough made affidavit that they consented to and approved of the present application; that the duties of the clerk were onerous, &c.; and "that the public business before the justices of the said borough could not be transacted but by the aid of a clerk to the said justices:" and, further, "that they consider it, and have always considered it, part of their duty as justices to dispose of and adjudicate upon the cases of persons brought before them by the police, and to receive such informations, and grant such warrants, as they are by law required to receive and grant, without delaying their proceedings in such matters by \*reason of the non-payment of fees to which their clerk may be entitled thereon." They added, "that they, as individuals, have not held out to the said S. Commeline any expectation that they would defray his said fees, or any part of them, nor do they believe the law imposes on them any liability so to do, nor would they consent to hold the office of justices (which they perform gratuitously) upon the condition of undertaking any such liability." The superintendent of the police of the borough deposed "that it would be impossible for the police to perform their instructions, or preserve peace and order in the said borough, if the said justices and their clerk were to refuse to decide upon the cases of persons apprehended and brought before them by the police without payment of the fees payable to their clerk in that behalf, or were to refuse to reduce informations into writing, or grant warrants and proceed to hearing and adjudication therein, without previous payment of the fees payable to their clerk in that behalf, inasmuch as the police themselves have no funds for the purpose of discharging such fees, and the persons proceeded against are generally wholly unable to discharge the same, supposing they are liable so to do." He stated also that, to the best of his knowledge and belief, all the items in the two bills were for business actually done by Mr. Commeline as clerk to the justices on the information of the police, and for other public municipal business of the borough; and that the charges were according to the table of fees allowed by the Secretary of State; that the two bills contained items which appeared to have been incurred in consequence of proceedings against persons brought by the police before the magistrates in custody for offences summarily punishable, \*and whose cases were thereupon heard and disposed of; and also items appearing to have been incurred in consequence of information laid by the police before the justices for offences so punishable, and of the necessary proceedings thereon: and that, to the best of the deponent's judgment and belief, the duties of the police could not be effectually performed, or the peace of the borough preserved, without transacting such business. [•866 [•867

Several members of the town council and watch committee made affidavit in answer, setting out proceedings of the council, and of a committee appointed by them to consider the fees and charges of the clerk to the justices, and on whose recommendation the council rescinded the resolution of December, 1837, made the payment of 54*l.* 15*s.* above stated, and refused to

pay the other charges, the committee expressing an opinion, as to the fees under their consideration, that payment of them by the town council was not warranted by stat. 5 & 6 W. 4, c. 76. The affidavit also stated that some of the charges were, on investigation, considered unreasonable.

*Chilton* and *Francillon* now showed cause. Unless the fees are payable under stat. 5 & 6 W. 4, c. 76, s. 92, there is no enactment by which they can be charged on the borough fund. They are not payable under sect. 82. [PATTESON, J. It appears from *Regina v. The Churchwardens of Chelmsford*, ante, p. 66, that they would not come within that clause as "extraordinary expenses."] Nor can they be insisted upon here as "other charges \*868] \*and expenses" mentioned in the latter part of the same clause; for, if they were within that description, payment of them has not been ordered in the manner there pointed out. Sect. 124 regulates the fees "to be taken by the clerk to the justices," but does not say by whom or to whom they shall be paid. The result may be a hardship; but it only places the clerk to borough justices in the same situation as a clerk to justices of a county. Sect. 92 makes the borough fund applicable to "expenses of the prosecution, maintenance, and punishment of offenders;" but those words do not include proceedings for summary conviction. Nor are the expenses in question "necessarily incurred in carrying into effect the provisions of" stat. 5 & 6 W. 4, c. 76; for the act nowhere makes it necessary, in the case of a party apprehended by the police and summarily convicted or discharged, that, if the fees due to the justices' clerk are not paid by the prosecutor or defendant, they should be paid by some other hand. The payment is, in fact, provided for by stat. 18 G. 3, c. 19, ss. 1, 2; and, if the legislature, when passing stat. 5 & 6 W. 4, c. 76, had intended that in future it should be made out of the borough fund, and not by one or other of the parties, as the justices in their discretion might order, that intention would have been expressed. *Regina v. The Council of Lichfield*, 4 Q. B. 893, applies in principle to this point. There the protection of the borough officer by a prosecution was as much a public object of the corporation as those for which the fees are claimed here; but the court said that payment of expenses ought to have been sanctioned beforehand by a \*869] \*vote of the council, and that in default of such vote they could not be charged upon the borough fund as necessarily incurred. A different practice would lead to retrospective rates, which, under stat. 5 & 6 W. 4, c. 76, cannot be imposed; *Woods v. Reed*, 2 M. & W. 777.

*J. W. Smith*, contra. *Regina v. The Council of Lichfield*, 2 Q. B. 893, the expense (costs of prosecuting at the assizes for an assault on the mayor in the execution of his duty) was not "incurred in carrying into effect the provisions of" stat. 5 & 6 W. 4, c. 76. Nor was the expense of such a prosecution "necessarily incurred." So it has been held that money furnished to a woman for the purposes of prosecuting her husband for an assault on her could not be recovered as an advance made to procure her necessities, *Grindell v. Godmond*, 5 A. & E. 755; though an attorney employed by her

to exhibit articles of the peace against the husband might sue him for the costs: *Turner v. Rookes*, 10 A. & E. 47. It does not appear that, if this mandamus were granted, a retrospective rate would be necessary; if the payment could not be made without, that might be matter for a return. The fees here claimed are within the terms of stat. 5 & 6 W. 4, c. 76, s. 92, "payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this act." The question turns entirely on these words. By sects. 76 and 77 the watch committee is empowered to appoint constables, who are to obey the lawful commands of the justices, and be subject to the regulations of the committee; and sect. 78 empowers \**"any con-* [•870  
*stable during the time of his being on duty to apprehend all idle or*  
*disorderly persons whom he shall find disturbing the public peace, or whom*  
*he shall have just cause to suspect of intention to commit a felony, and to*  
*deliver any person so apprehended into the custody of the constable appoint-*  
*ed under this act, who shall be in attendance at the nearest watchhouse, in*  
*order that such person may be secured until he can be brought before a*  
*justice of the peace to be dealt with according to law, or may give bail for*  
*his appearance before a justice of the peace, if the constable shall think fit to*  
*take bail."* What is so done by the constables is clearly "carrying into  
 effect the provisions" of the act: the cases so brought before the justices  
 must be disposed of; and for that purpose the clerk must discharge his  
 duties: his fees, therefore, are necessary expenses of putting the act in exe-  
 cution. Under sect. 124, the table of fees is made and settled, and to be  
 revised from time to time, by the council. Why should they have this  
 power, if the payment were never chargeable upon the borough fund?

LORD DENMAN, C. J. I am of opinion that these expenses ought to be considered as coming within the statute; and that the words "necessarily incurred" authorize payment to the officer out of the borough fund where parties themselves are unable to pay. The provisions of sect. 78 show that this must be so. As to the objection that a retrospective rate must be made, I do not see any certainty that that will be the case; and, if there should be a necessity for it, or, from any other circumstances, good cause should exist for not obeying the mandamus, that may be stated in a return.

\*PATTESON, J. It appeared to me that the only difficulty in this [•871  
 case was, to decide whether or not the expenses were "necessarily  
 incurred," within sect. 92. The words "prosecution, maintenance, and  
 punishment of offenders" seem applicable to cases prosecuted at the "sepa-  
 rate court of sessions" for the borough mentioned just before; and, in the  
 Bail court, where the present rule came before me, I thought it difficult to  
 say whether the words "expenses" "necessarily incurred" were in like  
 manner confined and therefore applicable only where a separate court of  
 sessions had been granted. But it would have been strange if there had  
 been such a restriction; and I think the provision is not so confined, and  
 that the "payment of the constables, and of all other expenses" "necessarily

incurred," &c., cannot, when we look to the words immediately preceding, be referred only to constables and expenses in those boroughs which have a separate court of sessions. Here, it is true, the borough has a grant of quarter sessions; but I wished to try the effect of the clause by considering what difficulty it might raise where there was no such grant. Then, as to the necessity of these expenses, I think that the expense of bringing offenders before the magistrates in the manner pointed out by the act is an expense necessarily incurred in carrying it into effect; and therefore that the rule ought to be absolute.

WILLIAMS and WIGHTMAN, Js., concurred.

Rule absolute.

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\*872] \*The QUEEN v. The Inhabitants of ST. GILES IN THE FIELDS.

Relief given by parish officers in a place out of their parish, but where they, by contract, have their paupers maintained, is the same in legal effect, as to settlement, as relief within the parish, and is therefore not *prima facie* evidence that the pauper is settled in the relieving parish.

Although it do not appear that such place was parish property, or established according to any statute for building or providing parish houses.

On an appeal against an order of two justices removing William Conqueror, and his wife and children, from the parish of Ashton under Lyne in the county of Lancaster to the parish of St. Giles in the Fields in the county of Middlesex, the sessions confirmed the order, subject to the opinion of this court upon the following case.

In the year 1823, the said William Conqueror, being a pauper in the parish of St. Giles in the Fields in the county of Middlesex, the appellant parish, was sent to Cresbrook, in Derbyshire, at the expense of the said parish, and remained at Cresbrook until the month of July, 1829; when, being out of work and in a state of destitution, he went direct from Cresbrook aforesaid to the parish of St. Giles aforesaid, for the purpose of obtaining relief. On his arrival in St. Giles's, he applied to the parish officers for relief, stating that he had just come out of Derbyshire; and he received from them a pair of shoes, and was desired by them to go back into the country to get something to do. He applied again for relief, on the Monday following, from the parish officers of St. Giles's, at their board, and received a shilling, after an inquiry made at the board whether he belonged to their parish. He received a shilling from them more than once during the space of several weeks. In the ensuing winter, the said W. C. being again

\*873] chargeable to the said parish of St. Giles whilst living \*there, he was taken into the workhouse of the said parish, which is situate within the limits thereof, and remained there for some months, until he was sent from thence with other paupers to Islington, out of the limits of the

parish of St. Giles, to the establishment of one Perry, a contractor for maintenance of paupers on behalf of that and other parishes, where he was maintained for some time at the expense of the said parish of St. Giles. Shortly after leaving that establishment, the said W. C. becoming again chargeable to the appellant parish whilst living therein, was admitted by order of the parish officers of the said parish of St. Giles into the Surrey Asylum, which is a similar establishment, and locally situate out of the limits of the said parish of St. Giles.

Upon these facts it was contended, on behalf of the appellants, that Perry's establishment at Islington, and the Surrey Asylum, though locally situate in another parish, were nevertheless to be considered, quoad all matters relating to the settlement of each pauper inmate, as integral parts of the parish by which the maintenance was defrayed; and, as the relief given to the said pauper, prior to his admission into Perry's establishment at Islington, was given to him whilst resident in the appellant parish, that there was no evidence of any such relief, given by the appellant parish to the said pauper whilst residing in another parish, as constituted an admission of his being settled in the appellant parish. But the court of Quarter Sessions were of opinion that, on the whole, there was such evidence upon the facts as above stated. And the question for the opinion of this court was, whether there was evidence of such relief as amounted to an acknowledgment of a \*settlement by relief. If the court should be of opinion that there was, then the order to be confirmed; if otherwise, then the order to be quashed. [\*874

*Townsend*, in support of the order of sessions. There was sufficient evidence of a settlement acknowledged by relief to the pauper while he was out of the relieving parish. *Rex v. St. Peter and St. Paul in Bath*, Cald. 213, S. C. 1 Bott. 432, pl. 483, 6th ed., may be cited for the appellants. There the inhabitants of two parishes had purchased ground, and built a workhouse, in a third parish, and it was held that paupers of the two parishes, sent into that house by them, were not removable by the inhabitants of the third parish. Lord MANSFIELD said: "when once the joint purchase is made, wherever it be, it becomes a part of the local system of each contracting parish:" and BULLER, J., intimated an opinion, but with doubt, that the workhouse, "so occupied and become in this manner the perpetual property of the united parishes," is "rather to be considered as part of those parishes to which it so belongs, than of the parish in which it is locally situated." But there the paupers sent into the third parish brought with them certificates of settlement from the other parishes: here no such acknowledgment was given; which fact alone distinguishes the two cases. And, in the former case, the parish sending out the paupers had acquired a property, according to statutory provision, in the place where the maintenance was had; here nothing appears but a contract between the parish officers and the keepers of certain establishments: it is not shown that the places in question were houses built or provided

\*875] according to the laws by which parish \*houses are regulated; as stat. 22 G. 3, c. 83. The place, therefore, must be considered simply according to its geographical position. [PATTESON, J. That alone is not conclusive. Suppose a man passing through the parish broke his leg, and the officers sent him to an institution out of the parish for cure.] There is at least some evidence in this case to support the order. The pauper is relieved for months by St. Giles's, while he is in other parishes; and it is not said that the officers of St. Giles's were unable to ascertain his settlement. This may fairly be considered an acknowledgment. [Lord DENMAN, C. J. An acknowledgment to whom? Suppose a pauper is taken suddenly ill in a parish, and it requires months to cure him; does that make the case the stronger against the parish relieving him?] If the case here be slight, yet, if the sessions have formed their judgment upon any evidence, this court will not reverse their decision. *Rex v. Edwinstowe*, 8 B. & C. 671; *Rex v. Trowbridge*, 7 B. & C. 252; *Rex v. Yarwell*, 9 B. & C. 894; and the language of Lord ELLENBOROUGH, in *Rex v. Chatham*, 8 East, 498, show that, on the effect of relief, the sessions may, upon any amount of evidence, form their own conclusion, and this court will not disturb it. Stat. 22 G. 3, c. 83, s. 39, (which applies only to poor-houses established under the authority of that act,) proves the understanding of the legislature that, but for such an enactment, paupers maintained in places out of the maintaining parish would become settled in such places.

*M. Chambers*, contrà, was stopped by the court.

Lord DENMAN, C. J. The sessions here ask our opinion whether there is evidence of such relief as \*amounts to an acknowledgment of a settlement by relief; and I am of opinion that there is not. It was decided by this court, in *Rex v. Chatham*, 8 East, 498, and *Rex v. Coleorton*, 1 B. & Ad. 25, that relief to a pauper resident within the parish, though it be given repeatedly and during a long period of time, is no evidence of settlement. It had before been held, in *Rex v. Chadderton*, 2 East, 27, that the bare fact of relief so given is not even *primâ facie* evidence of a settlement, since the pauper might have been casual poor, and, in that case, the parish officers were bound to relieve him, whether settled or not. The reason given in *Rex v. Chatham* is important. Overseers are bound to relieve persons in the situation of casual poor, and ought not to be deterred from doing so by the fear of establishing a settlement; since, if they were, paupers might die for want of relief. The present case is exactly like that of relief given within the parish. The pauper is found in the parish, and is carried to a parish house; and, the house being such, it is no matter whether the statutes for establishing such houses had been complied with or not.

PATTESON, J. I forgot, when this case began, that I was one of the appellants.

WILLIAMS, J. Mr. Townsend argues that the sessions here have decided upon the evidence: but the question they submit is, whether there be any

evidence to warrant this decision. From the time of *Rex v. Chadderton*, down to the present day, the rule has been, that relief given by a parish to a pauper resident \*in it is no evidence of a settlement. The argu- [\*877  
ment is, that such relief may in time grow up into proof of a settlement; but that would raise a very perplexing question, what number of payments would be sufficient? Would three, five, or ten? In this case, if ten payments had been made to the pauper within the parish, they would not have proved a settlement; and what difference does it make that the parish transfer him to a house out of the parish, and relieve him there?

WIGHTMAN, J. The officers in this case originally relieved the pauper in the parish, and then removed him to a place of their own in another parish, and relieved him there. It was the same as if all the relief had been given in St. Giles's; and then the cases as to the effect of relief given within the relieving parish are decisive.

Order of sessions quashed.

\*The QUEEN v. The Earl of DARTMOUTH and Others, Jus- [\*878  
tices of STAFFORDSHIRE.

The authority of justices in petty sessions to audit the accounts of overseers, under stat. 50 G. 3, c. 49, s. 1, is not taken away, as to any portion of such accounts, by stat. 4 & 5 W. 4, c. 76, s. 47; and the justices may allow items which have been disallowed by the auditor under the latter statute at his quarterly audit.<sup>(a)</sup>

On motion for a mandamus to justices, the court, if they doubt whether the writ should or should not be granted, will not direct it to issue merely in order that the justices may make a return, and be protected by stat. 6 & 7 Vict. c. 67, s. 3, if a peremptory mandamus should issue and be obeyed.

And, where a mandamus is directed to justices, they ought not to make a return instead of obeying the writ, merely to gain the protection of the statute.

A RULE nisi was obtained in last Michaelmas term, for a mandamus commanding the above-mentioned justices to make an order for the payment of 103*l.* 6*s.* 5*d.* by the late to the present overseers of Westbromwich, Staffordshire, and, if necessary, to issue a distress warrant, under the following circumstances.

Charles Stokes and three others were the overseers of the parish of Westbromwich from Ladyday, 1842, to Ladyday, 1843. The parish forms part of The Westbromwich Union; and Thomas Stonor Simkiss was the auditor of that union, under stat. 4 & 5 W. 4, c. 76, and under the rules and regulations of the Poor Law Commissioners. The overseers submitted their accounts to him quarterly, pursuant to the statute and to the orders of the commissioners. In the account submitted, January 30th, 1843, the auditor disallowed two items, amounting together to 82*l.* 11*s.* 4*d.*, and inserted his disallowance in the account. On April 1st, 1843, the overseers' year of office having expired, new ones were appointed; and Stokes submitted the

(a) See, now, as to the audit of accounts in districts composed of unions or parishes, stat. 7 & 8 Vict. c. 10<sup>1</sup>, ss. 32—33.

accounts of the outgoing overseers to two justices of the county, including the items disallowed in January by the union auditor; which items they inserted as of a date subsequent to January. The justices passed the account, allowing the items, though \*objected to by the auditor, who  
 \*879] attended the petty session. On the justices' audit, 48*l.* 3*s.* 10*d.* appeared due from the late overseers. On April 24th, Cooksey, another of the outgoing overseers, submitted their last quarter's account to Simkiss; and he, by a memorandum on the accounts, declared that he disallowed the items formerly rejected, and others, and that the balance due from the late overseers was 151*l.* 10*s.* 3*d.* They paid over 48*l.* 3*s.* 10*d.*, according to the allowance of the two justices, but refused to pay the residue.

An inhabitant of the parish appealed, at the midsummer quarter sessions, against the accounts as allowed by the justices: but the appeal "was not heard, owing to a preliminary objection to the notice of appeal." The new overseers then summoned the outgoing ones to show cause at a special session, why they should not pay over the balance of 109*l.* 6*s.* 5*d.* The parties attended before the justices, who were made defendants on the present rule. Stat. 4 & 5 W. 4, c. 76, ss. 47, 89, 99, was cited, to show that the justices might order payment of the balance claimed, according to the auditor's allowance. They, however, decided that, under the circumstances, after the allowance by two justices and after the appeal, the required order of special sessions could not be made.

In last Hilary term, (a)

*Whateley* and *J. Gray* showed cause, and contended: 1. That the two justices had still the same power to allow or disallow any part of the overseer's annual account under stat. 50 G. 3, c. 49, as before stat. 4 & 5 W. 4, \*c. 76. 2. That the power of the union auditor to disallow items  
 \*880] was subject to the discretion of the two justices on the annual audit. (b) 3. That the justices against whom the present motion was made had acted under sects. 47, 99, and 101 of stat. 4 & 5 W. 4, c. 76, in disposing of the summons, and had, under the last-mentioned clause, a discretionary authority, which they had exercised rightly, but with which, at any

(a) January 30th. Before Lord Denman, C. J., Patteson, and Coleridge, Js.

(b) On this point Patteson, J., observed to the counsel opposing the rule: "According to your argument, I do not see what effect the auditor's disallowance is to have." It was answered, that the disallowance might serve to call the attention of the justices to the items at the final audit; and that, although the control of the auditor, on this supposition, was not a very effectual one, the consequence was not so inconvenient as that of holding the disallowance to be final, inasmuch as stat. 4 & 5 W. 4, c. 76, did not, like stat. 50 G. 3, c. 49, s. 2, give the overseer an appeal; and other inconsistencies would arise, which were pointed out in the argument. On the other hand, Patteson, J., suggested to the counsel supporting the rule that, on their view of the statutes, the discretion of the two justices to allow or disallow was in effect taken away. It was answered, that there might remain a portion of time between the last audit of the union auditor and the end of the overseer's year, and that the justices would have full jurisdiction over the accounts of that period. [Patteson, J. That cuts down their jurisdiction from a whole year to a few weeks at most. Coleridge, J. The time may be but two or three days. Can it be supposed that the audit of the justices was preserved for so idle a purpose as this? It may be said also that the supposition on the other side makes the auditor's function an idle one. [Lord Denman, C. J. Except, perhaps, for the purpose of looking into vouchers.]

rate, this court would not interfere. 4. That, if the case was doubtful, a mandamus ought not to go.

Sir *F. Pollock*, attorney-general, and *Whitmore*, supported the rule, and contended, on the last point, that the court ought to grant a mandamus, for that the magistrates might then make a return, and if a peremptory mandamus were awarded they would be \*protected in obeying it by stat. [\*881 6 & 7 Vict. c. 67, s. 3.(a) [PATTESON, J. If the justices think they ought to do the thing, must they make a return to a mandamus, in order to be protected by the statute? Lord DENMAN, C. J. I think "peremptory" is an unfortunate word in the act. Before it passed, we had nearly shaken off the restriction as to granting a mandamus where doubts are suggested. If we are of opinion that the justices ought to do what is required, we ought to grant a mandamus: otherwise the applicant is without remedy. PATTESON, J. Magistrates are frequently not interested in preventing a mandamus being made peremptory; and the party really concerned in resisting the application may have no notice or opportunity to do so; under such circumstances no cause may be shown; and yet when the peremptory mandamus issues, it is conclusive, as a protection to the magistrates.]

(The judgment of the court renders any further report of the argument unnecessary.)

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered judgment.

This was an application for a writ of mandamus commanding certain justices to order the late overseers of Westbromwich to pay over to the present overseers the sum of 103*l.* 6*s.* 5*d.*, and, if necessary, to issue a distress warrant to levy the same.

At first it seemed as if this application had been founded on stat. 50 G. 3, c. 49, s. 1. By that section \*the overseers are directed, within [\*882 fourteen days after the expiration of their office, to deliver their accounts to two justices at a special sessions, who are to examine them, and allow or disallow the various charges. It is then provided that, in case such overseers shall neglect to pay their successors within fourteen days "any sum or sums of money or arrearages which *on the examination and allowance of such account in manner aforesaid, shall appear or be found to be due and owing* from such churchwardens or overseers, or any of them, or remaining in their hands, it shall and may be lawful for the subsequent churchwardens and overseers by warrant from any two or more justices of the peace, to levy all such sum and sums of money by distress and sale of the offenders' goods," &c. It is plain from this section that the justices can only issue their warrant for such sum as shall have been found due on the examination and allowance of the overseers' accounts by two or more justices at the special sessions within fourteen days of the overseers going

(a) Which enacts, that no action, &c., shall be commenced or prosecuted against any person "for or by reason of any thing done in obedience to any peremptory writ of mandamus issued by any court having authority to issue writs of mandamus."

out of office. Now it appears by the affidavits in the present case that the 103*l.* 6*s.* 5*d.* in question has not been so found to be due and owing. On the contrary, charges to that amount were allowed by the justices on their examination, as it is said, improperly, but at all events were allowed, and no such sum is found to be due and owing. The justices, therefore, have no power to issue their warrant under stat. 50 G. 3, c. 49 ; and of course this court cannot command them to do what by law they have no power to do.

There is no other act previous to the Poor Law Act, 4 & 5 W. 4, c. 76, which authorizes the issuing of any such warrant. Stat. 43 Eliz. c. 2, s. 2, \*883] directs the \*overseers within four days after they go out of office to make and yield an account to two justices, and to pay the balance to their successors ; but that act gives no remedy by distress, and applies only to the balance appearing by such account. Stat. 17 G. 2, c. 38, s. 2, directs the overseers to deliver an account to their successors, verified on oath, within fourteen days, and to pay over the balance ; and sect. 2 enables two justices to commit the overseer who neglects to deliver such account or pay over the balance, till he does so. But this act gives no remedy by distress, and applies only to the balance appearing on the overseers' own accounts. Stat. 50 G. 3, c. 49, is the next act, on which we have already observed.

The last act, 4 & 5 W. 4, c. 76, s. 47, directs the overseers to deliver, in addition to the annual account then by law required, accounts, quarterly, or oftener if the Poor Law Commissioners shall so direct, to the auditor or person appointed by the commissioners' rules to examine, audit, allow or disallow such accounts, and to verify them on oath if required ; and provides that all balances may be recovered in the same manner as penalties or forfeitures under that act. By sect. 99 penalties and forfeitures under that act are to be levied by warrant of two justices, by distress and sale of the goods of the offender ; and by sect. 101, power is given to summon the parties.

It should seem that an auditor was appointed by the commissioners, that quarterly accounts were rendered to him, and that he disallowed the charges in question, to the amount of 103*l.* 6*s.* 5*d.*, in the month of January, 1843. He considered them to be contrary to the provisions of that act, or at variance with the rules, orders \*and regulations of the commissioners : \*884] and, if so, no doubt they ought also to have been disallowed by the justices when the annual account was rendered to them ; for the 89th section of stat. 4 & 5 W. 4, c. 76, expressly provides that the justice shall disallow such items.

The justices, however, considered the charges not to be contrary to the provisions of the act, nor to the rules, orders and regulations of the commissioners, and allowed them, as we have already observed. Against this allowance there was an appeal to the quarter sessions, which seems to be given by the third section of stat. 50 G. 3, c. 49, and 17 G. 2, c. 38, s. 4 ;

and on that appeal the allowance was confirmed. Notwithstanding this, the auditor summoned the overseers before two justices, under sect. 101 of stat. 4 & 5 W. 4, c. 76, to compel them to pay over the sums which he had so disallowed and the justices and quarter sessions had so allowed. The justices refused; and we are now asked to issue a writ of mandamus commanding them to make such order, and, if necessary, to issue their warrant under the 99th section of the same act.

This we cannot do, unless we are prepared to say that the power of two justices, under stat. 50 G. 3, c. 49, to *allow* overseers' accounts, subject to appeal to the quarter sessions, has been wholly taken away, or at all events rendered wholly inoperative by the 47th section of stat. 4 & 5 W. 4, c. 76, and has been transferred without appeal to the auditor appointed by the Poor Law Commissioners. The attorney-general, in the course of his argument, distinctly contended that the justices had no power to allow in the annual account any item which has been disallowed by the auditor in *the* [•885] quarterly account, although they might perhaps have power to disallow what the auditor had allowed. The 47th section does not in terms authorize the auditor to disallow any items in the overseers' accounts; but it appears that a rule of the Poor Law Commissioners (a) does, which, under section 42, has the authority of an act of parliament: so that here are apparently concurrent authorities; and in the case of a conflict, as on the present occasion, it is difficult to say which was intended by the legislature to prevail. The authority of the justices was well understood at the time of the passing stat. 4 & 5 W. 4, c. 76: the mode in which it was to be exercised was clearly laid down, and an appeal given as well to the overseers as to any other person who might be aggrieved. This authority is evidently intended to be preserved; for the 47th section directs the quarterly accounts to be rendered in addition to the annual account, thereby preserving that annual account, and by consequence all that by law ought to be or might be done upon it. Then the 89th section further confirms the authority of the justices, for it directs them to disallow, not what the auditor shall already have disallowed, but all charges which shall be contrary to the provisions of the act, or to the rules, orders and regulations of the commissioners, leaving it to them to determine what charges are so contrary, and not mentioning the authority of the auditor: and this section contains a remarkable proviso: "Provided always, that no allowance by any justice shall exonerate or discharge such *overseer* or guardian from any penalty or [•886] legal proceeding to which he may have rendered himself liable by having acted contrary to the rules, orders, and regulations of the said commissioners, or to the provisions of this act." As if the legislature contemplated that justices, either from ignorance of the rules, orders, and regulations of the Poor Law Commissioners, or from misinterpreting them, or the

(a) The rule was not produced, nor stated on affidavit; and Lord Denman, C. J., and Ratteson, J., said that the court, not having it regularly before them, could not be supposed to know of its existence. See stat. 7 & 8 Vict. c. 101, s. 71.

provisions of this act, might happen to allow improper charges, and intended to guard against the shielding overseers from penalties, though the charges might stand good as items of their accounts by reason of the allowance of the justices.

Seeing, then, that the authority of the justices is evidently intended to be preserved, that no provision is made by which that authority is rendered subordinate to that of the auditor, nor any provision by which the exercise of such authority as the commissioners may think fit to give to an auditor can be reviewed by way of appeal, we are of opinion that whatever effect may have been intended to be given to the examination of overseers' accounts by an auditor, the ultimate allowance or disallowance of them is still vested in the justices, subject to appeal to the sessions.

We were reminded that, by stat. 6 & 7 Vict. c. 67, s. 3, all persons are protected from action in respect of any thing done in obedience to a peremptory mandamus, and were therefore asked to let this writ go if there be any doubt, inasmuch as the justices, by making a return, even if it should be bad, might induce a *peremptory* mandamus, and thus protect themselves from danger. But we do not feel that there is really any doubt in the case; nor do we think that we ought to hold out to justices that they should make a return to a writ of mandamus, \*instead of obeying it, for the sake of obtaining the protection of a peremptory mandamus under the late act.

This rule must be discharged.

Rule discharged. (a)

(a) See *Regina v. Fouch*, 2 Q. B. 308.

### The QUEEN v. JAMES CLARK.

Where justices have directed an indictment against a parish, under stat. 5 & 6 W. 4, c. 50, s. 95, for non-repair of a highway, and the judge of assize directs payment of the costs out of the parish highway rate, he must ascertain the amount of costs, and order payment of the sum so ascertained. Where the judge's order is only to pay the costs generally, this court cannot enforce such an order by mandamus.

Whether the amount can be ascertained after the commission of the judge of assize has expired, *quære*.

At a special sessions for the highways, holden 3d November, 1840, the justices of the liberty of St. Albans, Hertfordshire, ordered that Robert Bullock should prefer a bill of indictment at the next Hertfordshire assizes against the inhabitants of the parish of Chipping Barnet, in the said Liberty, for suffering a highway to be out of repair. The indictment was preferred, and a bill found, at the Hertfordshire Spring assizes, 1841; and the case was tried before GURNEY, B., at the Hertfordshire Spring assizes, March, 1842, when a verdict of guilty was returned. The learned baron respited the judgment, and, on application of the counsel for the prosecution, ordered that the costs should be paid out of the highway rate of the parish. The note of the clerk of assize in the court minute-book was as

follows: "The Inhabitants of the parish of Chipping Barnet for non-repair of a road. It is ordered by Mr. Baron GURNEY that the costs of this prosecution be paid out of the rate made and levied, or to be made and levied, in pursuance of the 5 & 6 W. 4, c. 50, in the said parish of Chipping Barnet." This note was signed by the learned baron; and he respited the recognisances to the next assizes for the \*same county. At the Hertfordshire Summer assizes, 1842, the judgment was respited to the next Hertfordshire assizes on the application of the defendants. Afterwards, the prosecutor applied to the taxing masters of the Crown office, and of some other offices, and to the deputy clerk of assize for the Home Circuit, to tax the bill of costs; which they all declined to do, alleging that they had no authority. In October, 1842, application was made to GURNEY, B., to ascertain the costs and insert the amount in his above-mentioned order: but the learned judge, after hearing counsel, refused to interfere. At the Hertfordshire Spring assizes, 1843, the prosecutor applied to PATTERSON, J., then sitting in the Crown Court, for the costs, but did not apply for judgment, as the road had been repaired. His lordship, after consulting Lord DENMAN, C. J., the other judge of assize, refused the application, and again respited the judgment. Immediately after the circuit, the prosecutor renewed his application to GURNEY, B., who refused a summons. At the Hertfordshire Summer assizes, 1843, the prosecutor applied to PARKE, B., then sitting in the Crown Court, for judgment and costs: but his lordship refused to make any order as to the costs, and discharged the recognisances. (a) Afterwards, the prosecutor requested the clerk of the peace for Hertfordshire to tax the costs, as if they had been referred to him by both parties. The clerk of the peace did so, and allowed 320*l*. The bill of costs was delivered to James Clark, being then surveyor of the highways of Chipping Barnet, and payment demanded; but he refused to pay.

\**Kelly*, in last Hilary term, on affidavit, setting forth the above facts, obtained a rule calling on Clark to show cause why a mandamus should not issue, commanding him to pay to Robert Bullock, or his attorney, "the costs of the prosecution of the indictment against the inhabitants of the said parish in the said affidavit mentioned." [889]

From the affidavits in answer it appeared that no amount of costs had been in any way ascertained at the Spring assizes, 1842; that Clark had been appointed surveyor in April, 1842; that 32*l*. only had been handed over to him by the previous surveyors; and that, at the times of the delivery to him of the bill of costs and of the service of the present rule nisi, he had in his hands, as surveyor, not above 50*l*.

*Platt* and *Godson* now showed cause. This order for costs was made in supposed pursuance of stat. 5 and 6 W. 4, c. 50, s. 95, which enacts that, where the justices have directed an indictment to be preferred at the assizes or quarter sessions against the inhabitants of a parish, "the costs of such prosecution shall be directed by the judge of assize before whom the said

(a) It was stated, on the argument, that a fine of 1*s*. was imposed.

indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act in the parish in which such highway shall be "quarrelled." But the order is incomplete, because the learned judge has only given a general direction to pay the costs, but has not stated the amount: and there are no means of ascertaining it. The judge of assize was functus officio when the assizes were over: neither he nor any one could afterwards act in fixing the amount: and, even if that could be done, it has in fact not been done. Under sect. 90, an order of \*890] quarter sessions to "pay the costs of an appeal against an order for stopping up a highway must specify the sum payable; *Sellwood v. Mount*, 1 Q. B. 726. In *Regina v. Long*, 1 Q. B. 740, it was held that, where the sessions have given costs of an appeal against an order of removal, under stat. 4 and 5 W. 4, c. 76, s. 82, without fixing the amount before the sessions are at an end, it cannot afterwards be fixed. [WIGHTMAN, J. Must the taxation take place during the assizes? Suppose the cause is the last to be tried.] Parties may come with their bill prepared, as is commonly done at sessions. Here the costs would fall on a surveyor who has no funds to meet them. He is not even the party who pleaded to the indictment.

*Kelly and Bramwell*, contra. The judge has followed the terms of the statute: no officer is designated as the proper party to tax the amount. Criminal courts have a similar power as to the costs of prosecutions for felony, under stat. 7 G. 4, c. 64, s. 22: and there no officer of the court is named for ascertaining the amount. It may be a casus omissus: but the result seems to be that the law must fix the amount. [PATTESON, J. By what means?] It may be determined by this court, upon affidavit; and a mandamus may issue for the sum. [PATTESON, J. What power have the four judges in the matter?] Under stat. 1 W. 4, c. 21, s. 6, the court has power to give costs in mandamus: in point of fact the judges do not ascertain the amount, but leave it to the officer of the court. The judge of assize may act in the same way through the instrumentality of the officer. \*891] The parties to be charged here have "no opportunity of contesting the amount before a judge. [PATTESON, J. Nor has the county treasurer in cases of felony.] What can be done where a judgment is respited, as was the case here? [PATTESON, J. Where magistrates have power to give costs summarily, and the statute does not designate the party who is to ascertain the amount, the magistrates must fix it themselves.] *Sellwood v. Mount*, 1 Q. B. 726, and *Regina v. Long*, 1 Q. B. 740, are inapplicable: the Court of Quarter Sessions has an officer whose business it is to tax costs. In sect. 82 of stat. 4 & 5 W. 4, c. 76, on which *Regina v. Long* turned, the expression is "shall" "order," &c. "such costs and charges as may to such court appear just and reasonable, and shall certify the amount." In stat. 5 & 6 W. 4, c. 50, s. 90, it is enacted that the court "shall award the costs:" that explains *Sellwood v. Mount*. But the judge of assize, under sect. 95 of the same statute, does not act as a court,

properly speaking, in directing the costs to be paid. It seems that he must make the order, whatever be the verdict. [Lord DENMAN, C. J. I ruled so at the Sussex assizes;(a) but I am happy to say that a different view has been taken, to which I have conformed.(b) The judge hardly acts judicially. [PATTESON, J. Then do you say that the rule is different, when the case is tried at the assizes and when it is tried at quarter sessions?] The court of quarter sessions does not, as to ordering these costs, act as a court: if it does, there may be a different rule; but then no argument arises upon the difference. [PATTESON, J. Where a judge certifies for costs, he does not \*indeed order their payment: he vouches for a fact, upon which [\*892 the court acts. But here the order to pay emanates from him only.]

No difficulty is created by the change of surveyors: the money must be paid, on the part of the parish; out of the rate made or to be made. [PATTESON, J. If the judge has done all that he can do, why not indict, which was held to be the proper course in *Rex v. The Treasurer of the County of Surrey*, 1 Chitt. R. 650.] Mandamus is a more effectual remedy: and parties may now obtain the judgment of a court of error. The remedy by mandamus was allowed in *Rex v. The St. Katherine Dock Company*, 4 B. & Ad. 360, for enforcing an award which, among other matters, gave costs. The principle of not putting a party to an indictment, where that gives an insufficient remedy, has been acted on in a large class of cases, comprehending *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, and *Regina v. The Bristol Dock Company*, 2 Q. B. 64.

Lord DENMAN, C. J. The court is placed in great difficulty in considering the situation of these parties. The inhabitants of the parish are found guilty on the indictment; and no doubt the legislature meant that, under such circumstances, the parish should pay the costs. The only question is, whether the statute has been properly acted upon. The language of sect. 95 is: "and the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried," "to be paid out of the rate." I think we must hold the meaning of this to be, either that the amount of costs shall be ascertained by the judge before he directs them to be paid, or that, if in general \*terms he directs the payment, the [\*893 costs shall be placed in the usual course of being taxed by the proper officer. We have not now to inquire whether the judge acts as a court of oyer and terminer in this respect, or whether the statute gave him the power of directing, in general terms, that the costs shall be paid. He has, in fact, given the direction in general terms; but he has not put the costs into the course of being ascertained. That is the position in which things stand for the whole time during which the learned judge holds the commission. We are now asked to order the payment, not of costs taxed or in any way ascertained as to amount, but of costs generally. It appears to me that we cannot call on the surveyor to inquire into the amount, and that we are not in a

(a) Probably in the case referred to in *Regina v. Pembridge*, 3 Q. B. 901, 903.

(b) See *Regina v. Chedworth*, 9 U. & P. 285. Also *Regina v. Heunor*, post, Hil. T. 1845.

situation in which we can order him to do any thing. I do not inquire how far the change of parties may make the proceeding inexpedient; for I think that there is no subject matter to which a mandamus can apply. If the learned judge has any power, the parties must call upon him to act. It is true he is of opinion that he has no power. If he is right, the case of course falls to the ground, because he has not acted in time. But, if he has the power, there is nothing to prevent his exercising it. When costs in a court of justice are spoken of, the meaning is, not any costs that can be ascertained by any means, but costs to which the court can apply its mind, not leaving the amount in vacuo. The dilemma therefore concludes us. Either the judge had the power then and has it no longer; or, if the power was independent of the duration of the commission, he may act now, and  
 \*894] put the prosecutor in a situation to apply \*to us. But, on the materials now presented, there is no ground for making the rule absolute.

PATTESON, J. Assuming that a mandamus is the proper remedy in such a case, (a point which is not clear, and as to which I desire not to be concluded,) we are called upon to command the surveyor to pay an unascertained sum, or else to say ourselves what the sum is. It is inferred, from the sum not being ascertained, that we ourselves must determine what it is. I cannot admit that this is sound: such a doctrine has never been laid down. When the legislature says that the judge shall direct the costs to be paid, the meaning must be that he should ascertain the amount, either by himself, or his officer, or some one whose advice he may take. I do not inquire whether this must be done during the time for which the judge holds the commission, or may be done at any time afterwards: but it is by him that it must be done at some time or other. That being so, we cannot grant a mandamus to pay what is not ascertained. Other points have been made; as, whether the liability attaches only to the individuals who plead to the indictment, or binds the whole parish or its successive officers. I wish to be understood not to decide on these, though I have an opinion. It is enough to say that the costs are not ascertained, and we therefore cannot make an order for the payment.

WILLIAMS, J. This is surely a case in which the costs ought to be paid: but the question is, whether we are to grant a mandamus. In considering that, we are to see whether there has been any omission on the part of the  
 \*895] applicant. For, if the judge's order for \*payment, made before the amount is ascertained, be enough to set matters in a proper course, it does not appear that the party applying has taken steps to set them in such proper course. Suppose the clerk of assize had been required to tax, and had refused to enter upon the taxation, there would be as good ground for a mandamus directed to him as there is for the present rule. How can a mandamus go for the payment of a sum not ascertained? That is a decisive objection. We need not inquire whether a judge of assize has peculiar means of ascertaining the amount. In sect. 95, the judge of assize and the court of quarter sessions are spoken of as the two alternatives; and

possibly this might suggest an inference as to the nature of the judge's power. But here it is at any rate not clear that an order of the judge may not yet be made: if so, it is a strong reason against granting this mandamus, that a party may be indicted for disobeying such an order.

WIGHTMAN, J. I agree, with much reluctance, that this rule must be discharged. It is clear, indeed, that the parish ought to pay the costs. But, without inquiring into other difficulties, my opinion is founded on this, that the mandamus will be for payment of costs generally, not of a specific sum. Suppose a peremptory mandamus to follow: what payment, in amount, would be an obeying of the writ? Must it be of such a sum as the prosecutor chooses to demand? The sum must be ascertained in some way or other. It is not necessary to say how this is to be done: but, until it is done, what is the party to pay? That difficulty is insuperable.

Rule discharged, without costs.

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\*The QUEEN v. The Justices of the Parts of KESTEVEN, LIN- [\*896  
COLNSHIRE.

Reported, 3 Q. B. 810.

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The QUEEN v. DEIGHTON.

On the election of an alderman for a borough, if the voting papers do not contain an accurate description of the place of abode of the party voted for, the votes are bad, under stat. 7 W. 4 & 1 Vict. c. 78, s. 14; though the inaccuracy be without fraud, and the description in the voting paper be commonly understood to be that of the party.

INFORMATION, in the nature of a quo warranto, against Joseph Jonathan Deighton for claiming to have, &c. the office of alderman in the borough of Cambridge.

The plea set out the particulars of the defendant's occupation and residence, the rating, and other requisites of qualification, and the insertion of his name, &c. in the burgess roll: and it alleged that he was, on 9th November, 1841, before he exercised the office, elected to be an alderman of the borough, according to the statutes then in force, and duly made and subscribed the declaration, &c., and was admitted, &c., and did thereupon use and exercise, thence continually, &c., being during all that time duly qualified, and still doth use, &c., the said office. Verification.

Replication (so far as material to the point decided.) (a) That the election took place at a meeting \*of the council held on, &c., after the [\*897  
passing of the statute, &c., (7 W. 4 & 1 Vict. c. 78.) "That the  
voting papers personally delivered to the mayor of the said borough at such meeting, by the members of the said council who voted at such meeting for the said J. J. Deighton to be an alderman of the said borough, (he, the

(a) Several objections to the title of the defendant were made, besides that upon which the court decided: but it is thought unnecessary to insert the parts of the record, or argument, relating to the points not noticed in the judgment.

said mayor, then and there being the chairman of and at the said meeting,) did not, nor did the said voting papers of any or either of the said last-mentioned members of the said council, contain the place of abode of the said J. J. D., for whom the said last mentioned members of the said council so then and there, at the said meeting, voted to be such alderman :” “that the said voting papers contained an inaccurate and untrue statement of the place of abode of the said J. J. D. in this, to wit, that the place of abode of the said J. J. D. is in and by the said voting papers stated to be Trinity street, whereas in truth and in fact the place of abode of the said J. J. D. before and at the time of the holding of such meeting, and at the time of the delivery of the said voting papers to the said mayor as aforesaid, and at the time of his being so elected an alderman of the said borough at the said meeting, was at Harston in the county of Cambridge, and not at Trinity street, or elsewhere than at Harston in the county aforesaid.” Verification.

Rejoinder. That, in each of the said voting papers personally delivered to the mayor of the said borough at the said meeting by the members of the said council who voted at such meeting for the said J. J. D. to be an alderman as aforesaid, he, the said J. J. D., then, to wit, in the county aforesaid, was described as of Trinity street, bookseller: “that he was so described \*898] in the \*said voting papers, and each of them, without any fraud or intention to mislead, in him, the said J. J. D., or any of the members of the council who so voted for him as aforesaid; and that the said description of the said J. J. D. was, at the time of the said election, and at the time of the delivery of the said voting papers and every of them, such as to be commonly understood, and the same then was commonly understood, as the description of the said J. J. D.; and the same description then and there was such as to be, and the same then and there was, commonly understood by and amongst the then members of the said council, and the then burgesses of the said borough, and other the persons interested in the said election; and the said J. J. D. was then and there perfectly well known by the said description, and as well known by the members of the said council and the said burgesses, and the said other persons, as if he had been then and there described, or as if his place of abode had been mentioned and set forth in the said voting papers, or any of them, in any other manner than as above is mentioned.” Verification.

General demurrer. Joinder.

The demurrer was argued on a former day of this term.(a)

*Gunning* for the Crown. Stat. 7 W. 4 & 1 Vict. c. 78, s. 14, enacts that the election of the aldermen shall be by every member of the council delivering “a voting paper containing the Christian name and surname of \*899] the persons for whom he votes, with their respective \*places of abode and descriptions.” Similar requisites were laid down for the election of councillors, by sect. 32 of stat. 5 & 6 W. 4, c. 76. The replication shows that the voting papers here did not correctly state the defendant’s

(a) April 24th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, J.

place of abode. The only answer which the rejoinder offers to this objection is, that the description was given without fraud, and was understood to be the description of the defendant. But the statute does not permit such an equivalent. That would, indeed, be an answer, had such a misdescription occurred in the election of a councillor, by the concluding clause of sect. 142 of stat. 5 & 6 W. 4, c. 76. [Lord DENMAN, C. J. It is difficult to find the reason for such a distinction.] Perhaps the legislature required greater exactness in the case of aldermen on account of the longer duration of the office, and because the election is made by a select body, the council, and more care may therefore be expected. The express relaxation in the earlier statute shows that the absence of such relaxation in the later is not accidental. That argument was applied to the interpretation of statutes by the judges in *Moser v. Newman*, 6 Bing. 556: and the principle is pointed out in 2 Darris on Statutes, 707.

*Byles*, Serjt., contra. The words "places of abode," in stat. 7 W. 4. & 1 Vict. c. 78, s. 14, must not be too strictly construed. A "residence" may perhaps mean only the place where a party sleeps. But he may be said to abide in any place which he frequents. Besides, the statute in this respect is only directory. Sect. 14 requires that the members of the council shall "personally" deliver the papers to the mayor or \*chairman: [\*900 but would the election be invalidated if the member handed his paper to a third party to deliver to the mayor, and that was done in the member's presence? Or would the omission of the Christian name make the vote bad? The same section requires also that the mayor or chairman shall "openly produce and read" the voting papers. Suppose he read them without openly producing them, or vice versa; would the whole proceeding be vitiated? Further, the act must be read as one with stat. 5 & 6 W. 4, c. 76; and sect. 142 applies. The election does take place, properly speaking, under stat. 5 & 6 W. 4, c. 76. The later act merely adds a direction as to the formal mode of proceeding.

*Gunning*, in reply. *Regina v. Alderson*, 1 Q. B. 878, is an instance of the strictness with which the statutory directions, as to the election of aldermen, are construed. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

The description of the place of abode given in the voting papers is not true; and the defect is not cured by any thing in the act.

Judgment for the Crown.

\*The QUEEN v. The Inhabitants of CATTERAL. [\*901

If the complaint on which paupers are removed purports to be "the information and complaint of R. R., assistant overseer," without any further statement as to the complaint, and copies of the order of removal and examinations are transmitted by the removing parish according to stat. 4 & 5 W. 4, c. 76, s. 79, *Quære*, whether the sessions, on appeal, may at once treat the complaint as made without authority, and on that ground quash the order of removal, or whether they must receive evidence, if tendered, to show that the assistant overseer was in fact authorized to lay the complaint.

The examinations on which an order of removal was made stated that the pauper came to live with B. as a farm servant : that he was not engaged for any particular time, but that B. found him board, washing, lodging and clothes for so long a time as he stayed : that pauper continued in B.'s service in that manner, without leaving, for three years, during all which time he lived and slept on the farm ; that there never was any other agreement come to, but B. found pauper in board, washing, clothing and lodging during the said service.

*Held*, that the examinations did not show any hiring, and were therefore insufficient.

ON appeal against an order of two justices, removing William Nuttall and Mary Ann Nuttall his child, from the township of Catteral to the township of Dutton, both in the county of Lancaster, the sessions quashed the order "for defect in examinations," subject to the opinion of this court upon the following case.

The appeal was against an order, &c. (as above.) The information and examinations were respectively as follows :

The information. "Lancashire, to wit. The information and complaint of Richard Raby, the assistant overseer of the poor of the township of Catteral, in the said county, taken upon oath before us, two of her Majesty's justices," &c., "in and for the said county, the 27th day of May, A. D. 1843: who saith that W. Nuttall and Mary Ann, aged about fifteen months, his child, have come to inhabit in the said township of Catteral," &c., "and that they are poor and actually chargeable to the said township of Catteral, and that he is informed and believes their last legal settlement is in the township of Dutton in the said \*county, to which place he desires  
\*902] an order to remove them. (Signed) Richard Raby. Sworn," &c.

The examinations. "Lancashire, to wit. Examinations," &c. "William Bowin saith : I am a farmer in the township of Dilworth, in this county, and reside at a farm called Written Stone. I was married in December, 1833. I lived at home with my father about a year and a half after my marriage, when I went to live at the farm I now reside at. My father's name is also W. Bowin, and he lives at a farm in Dutton in this county, called Gudgeons, which he has lived upon for upwards of thirty years. Better than two years before I was married, the pauper W. Nuttall came to live with my father as a farm servant : he was not engaged for any particular time ; but my father found him board, washing and lodging and clothes, for so long a time as he stayed. The pauper W. N. continued in my father's service in that manner without leaving, from the two years before I was married until after I left home to live at Written Stone farm ; during all which time he lived and slept on my father's farm in Dutton ; and during all which time he was a bachelor. There never was any other agreement come to whilst I lived at home : but my father found the pauper W. N. with board, washing, clothing and lodging during the said service. (Signed)" &c.

"The pauper, W. Nuttall, saith : Better than two years before the witness W. Bowin was married, I went to his father's, W. Bowin of Dutton farm, as a farm servant. There was no agreement as to the length of my service ; but I was found with board, lodging, clothing and washing whilst I stayed. I continued in the service from the commencement of the time I

went \*until the witness W. Bowin left home to live at Written Stone, [\*903 being altogether upwards of three years and a half; during all which time my said master W. Bowin (the father) found me board, lodging, clothing and washing. I slept at his farm, and was a bachelor, during such my servitude. The farm was in the township of Dutton, in this county, and was called Gudgeons. I was lawfully married about eighteen months ago," &c. (The rest of the examination is not material.)

The following were the grounds of appeal, duly served by the appellants on the respondents. "1. That the order is void, and was made without any complaint of or by the parties who by law are authorized and required to make such complaint. 2. That the examinations on which the said order of removal was made were not, and are not, in law sufficient to justify the making of the said order. 3. That the examinations are bad upon the face of them, and do not state the necessary facts from which it can or may, or ought to be, implied that the said W. Nuttall did gain a settlement by hiring and service as in the said examination pretended. 4. That the examinations do not state or sufficiently show that at the time of the alleged hiring and service the said W. Nuttall was an unmarried person not having child or children, as by law required." The other grounds stated are not material.

The appeal came on to be heard at the Lancashire quarter sessions, (Preston, October, 1843,) when the respondents offered to produce evidence in support of their order; but the appellants objected that the complaint and examination, or one of them, were or was insufficient, so that the order was incapable of being supported by any evidence. The sessions, after argument, \*and without hearing the evidence offered, set aside the order [\*904 of removal for the insufficiency of the examinations, and subject to the opinion of this court as to the sufficiency of the complaint and examinations as above set forth.

If this court should think that any of the objections taken by the grounds of appeal ought to have prevailed, the order of sessions was to be confirmed: if the court should think that none of them ought to have prevailed, the order was to be quashed.

*Whigham*, in support of the order of sessions, referred, on the first point, to stat. 13 & 14 Car. 2, c. 12, s. 1, stat. 59 G. 3, c. 12, s. 7, and *Bennett v. Edwards*, 7 B. & C. 586. The Court then called upon

*Cowling*, contra. Stat. 13 & 14 Car. 2, c. 12, s. 1, requires only a "complaint made by the churchwardens or overseers of the poor of any parish." It was sufficient here, if the complaint was made on their behalf, by their authority; and that would have been established if it had appeared in evidence either that the giving notice was a duty of the assistant overseer by virtue of his appointment, or that he was in fact authorized by them to give it. In the latter case, *Regina v. Bedingham*, ante, p. 653, would have been applicable. The sessions, therefore, were not justified in refusing to hear evidence. [PARTESON, J. Is there any case showing that the complaint may be made by the attorney of the overseers; by a person employed

\*905] to represent them?(a) \*A sufficient authority might have been shown by evidence. Though the proceeding had been irregular, the removing parish, if they had expressly or impliedly sanctioned it, would have been concluded, on the principle laid down in *Regina v. Leominster*, antè, p. 640: and the parish officers here have shown their adoption of the complaint by sending the examinations and other documents required by stat. 4 & 5 W. 4, c. 76, s. 79. The form of the complaint, as stated in the case, is immaterial. It need not be in writing; and the entry of it by the justices is a mere memorandum, not a record. The appellants have suffered no prejudice.

*Whigham* was then desired by *The Court* to proceed upon the second point. The examination does not show a hiring for a year. In *Rex v. Wincaunton*, Burr. S. C. 299, it was stated that the master "hired the pauper to serve him in husbandry," and the court inferred a hiring for a year; but here no hiring is expressly stated. The case is like *Rex v. Christ's Parish in York*, 3 B. & C. 459, where the statement was that the pauper "went to Mr. Francis Peacock for meat and clothes, as long as he had a mind to stop."(b) *The Court* then called upon

*Cowling* as to this point. The words of Bowin's deposition, "there never was any other agreement come to," show that there was some agreement for service, on the terms before specified. [Lord DENMAN, C. J. It is \*906] \*not said that the parties contracted or agreed, or that the pauper was hired at all to stay with the master. No obligation of any sort appears.] The question is, whether the examination did not afford some evidence, though it might be weak. A general indefinite hiring is a hiring for a year, unless something appears that may raise a presumption to the contrary: *Rex v. Stockbridge*, Burr. S. C. 759. [Lord DENMAN, C. J. There a general hiring was stated. A hiring for a year may be inferred from the statement of a general hiring; but it is a different thing to infer a hiring from the fact of parties having lived together a certain time. WILLIAMS, J. If there was a contract, why was not it stated in the examinations? PATTESON, J. This examination, properly construed, purports only that there was no agreement at all.]

*Per Curiam.* (c)

Order of sessions confirmed. (d)

(a) See *Regina v. The Recorder of Worcester*, antè, p. 508, note (n), where, however, the question turned upon stat. 4 & 5 W. 4, c. 76, s. 81, which is differently worded from stat. 13 & 14 C. 2, c. 12, s. 1.

(b) *Whigham* also contended that the examinations contained nothing equivalent to an allegation that the pauper was an "unmarried person, not having child or children," (3 & 4 W & M. c. 11, s. 7,) when he went into the service.

(c) Lord Denman, C. J., Patteson, Williams, and Wightman, J.

(d) See the next three cases.

\*The three following cases may conveniently be inserted here. [\*907

The QUEEN v. The Inhabitants of the Township of LEEDS.

(PRESTON v. LEEDS.)

If the complaint on which paupers are removed purports to be "the information and complaint of D., general assistant overseer of the poor of the Preston union," of which the removing township is part, without any further statement as to the complainant, and copies of the order of removal and examinations are transmitted by the removing parish, according to stat. 4 & 5 W. 4, c. 76. s. 79, *Quære*, whether, on appeal, it be ground of objection that the complaint was made by a person not appearing, on the face of the document, to have any authority?

*Seemle*, per Patteson, J., that, if the sessions, on hearing evidence, have confirmed the order, this court may presume that an authority in fact was proved.

If pauper in his examination states that he took a house for a year at 19*l.*, and resided, &c., and "paid rent" for the whole time of his tenancy, this does not show the house to have been held, and "the rent for the same" paid, within stat. 59 G. 3, c. 50.

On appeal against an order of two justices, removing Matthew Redmayne and Ann his wife from the township of Preston, in Lancashire, to the township of Leeds, in the West Riding of Yorkshire, the sessions confirmed the order, subject to the opinion of this court upon a special case, the material parts of which were as after stated.

The information and complaint, and the examination, on which the order was made, were respectively as follows: "Borough of Preston in Lancashire, to wit. The information and complaint of Thomas Dixon, general assistant overseer of the poor of the Preston Union, of which union the township of Preston in the said borough is part: taken before us," &c., "who saith," &c. The case then proceeded to set forth, in the words of the complaint, the coming to inhabit, the want of settlement, &c., and the chargeability, in the usual form: "And that he is informed and believes that their last legal settlement is in the township of Leeds, in the West Riding," &c., "to which place he desires an order to remove them. Thomas Dixon. Sworn," &c.

\*The examination of Matthew Redmayne was set forth in the case as follows: [\*908 "In the month of May, 1820, I became the tenant of a house in Kirkgate, in the town of Leeds, in the West Riding," &c. "I know not the name of the landlord of the house; and I do not believe I ever heard it; but the steward of the house, and from whom I took it, was a Mr. Wild, an old man, who then lived in Leeds: the house, when I had it, was number 19," &c. (Some particulars followed, on which nothing turns.) "I took the house for a year, at, I believe, 19*l.*; but I am not certain whether it was a pound more or less. I entered on and resided in the house in the said month of May, and continued to reside upon it with my family until the month of October, 1821, when I left it. I paid rent for the whole time of my tenancy. I have not since done any act to gain a settlement." (The rest of the examination related to the chargeability.)

The appellants received, with the order and foregoing complaint and examination, the following notice of chargeability. The case then set out the

notice, stating the chargeability, and that an order of removal had been obtained, &c. The notice was signed by two persons styling themselves "overseers of the poor of the said township of Preston." It stated the grounds of appeal, raising the points afterwards discussed at sessions.

On the trial of the appeal at the quarter sessions of the peace for the county of Lancaster, holden, &c., (Preston, 28th June, 1843,) it was contended on the part of the appellants: 1. That the order of removal was void, having been made without complaint of or by the persons or parties who by law are authorized and required to make and institute such complaint. 2. That the \*complaint and examination did not sufficiently  
 \*909] show chargeability. (No further notice of this point is necessary.) 3. That it did not sufficiently appear, upon or by the examination aforesaid, that the house mentioned therein was held, and the rent for the same actually paid, by the said M. Redmayne, for the term of one whole year at the least. The court of quarter sessions overruled the objections, and, after hearing evidence in support of the order of removal, confirmed the order, subject to the opinion of this court upon the points taken and stated in the foregoing objections.

If the court should be of opinion that the objections, or any or either of them, ought to have prevailed, the order of removal was to be quashed for deficiency in the examination. If otherwise, the orders of removal and of sessions to be confirmed.

*Cowling*, in support of the order of sessions, urged, as to the sufficiency of the complaint, the power which an assistant overseer might have to lay the information on behalf of the other parish officers, and the adoption of it by them, as in the preceding case. By stat. 4 & 5 W. 4, c. 76, s. 46, (explained, as to the word "officers," by s. 109,) the Poor Law Commissioners may direct the guardians of any union to appoint an assistant overseer, and may define his duties. The assistant overseer, therefore, is, to some extent at least, a lawful agent of the overseers in a union. Evidence was heard in this case; and it may have been proved that a part of his duty was to lay the complaint of chargeability, or that he did it by the immediate direction, or even in the presence, of the overseers. It was not necessary  
 \*910] that the information should be drawn up in writing; and it \*appears from *Regina v. The Justices of Buckinghamshire*, 3 Q. B. 800, 807, that, if there has been a complaint on which the justices have acted, this court will not inquire minutely whether all the facts necessary to sustain it can be made apparent.

The objection as to the payment of rent is, in substance, that the words "I paid rent for the whole time of my tenancy" do not necessarily imply a payment of the before-mentioned rent, amounting to 19*l*. But this is merely a critical view of the examination. The sessions, before whom the whole evidence was, have overruled the objection, and found, in effect, that the pauper did pay the requisite amount of rent. This court will not presume, from the examinations, that one rent was agreed for and another paid.

An unlettered man making a deposition cannot be expected to speak with the exactness which this objection demands.

*R. Hall*, contra. As to the first point, Dixon is stated to be "general assistant overseer of the poor of the Preston union, of which union the township of Preston" "is part." That does not show any agency in Dixon for the township of Preston. The guardians of the union could not appoint an officer for the purpose of making removals from an individual township: they have nothing to do with removals, and cannot direct a complaint. [PATTESON, J. I do not know what the assistant overseer of a union is: a union has no overseers.] If Dixon has any authority, he has misstated it; and the case is then like *Ex parte The Overseers of Harnley*, 1 Dowl. & Lowndes, 673. The complaint does not purport to be made by an agent. The \*overseers are not shown to have adopted that particular proceeding; and, if they had, that which was originally a nullity cannot be confirmed; Co. Litt. 295 b., Shep. Touchst. 313. [\*911 PATTESON, J. Suppose there appeared no description of the party informing, but the magistrates were satisfied that, in point of fact, he had authority to inform.] If he really had none, and the objection was brought to the notice of the justices, their decision would not cure it; though, if the defect was unknown to them, the case might be different, according to *Regina v. Althernun*, 10 A. & E. 699. [PATTESON, J. If we think the sessions right in other respects, we shall probably say they were satisfied in the beginning that the assistant overseer had authority.]

The examination does not state the requisite payment of rent. *Regina v. The Recorder of Pontefract*, 2 Q. B. 548, shows the accuracy with which an examination ought to follow the statute under which this kind of settlement is claimed. Consistently with this examination the pauper may not have paid "the" rent for the house, according to stat. 59 G. 3, c. 50. (*Whigham* and *Pashley*, on the same side, were not heard.)

LORD DENMAN, C. J. I cannot find enough stated here to give a settlement. It does not appear what rent was paid. I am sorry that the omission of one little word should make the difference; but it does so. The orders must be quashed.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Orders quashed.(a)

(a) See the preceding and next two cases.

## \*912]      \*The QUEEN v. The Inhabitants of ST. OLAVE'S, SOUTHWARK.

A certiorari issued to bring up all orders made between "*The Inhabitants*" of the parish of M. and those of the parish of O. An order of sessions was returned, made on appeal by "*The churchwardens and overseers*" of M., against an order of removal from O. to M.

*Held*, no variance.

A statement in grounds of appeal, that the pauper became tenant of a house, &c., occupied it for seven months, and "*paid*" the parochial rates or taxes in respect of such house, does not show a settlement by being *charged with* and paying public taxes, &c., within stat. 3 & 4 W. & M. c. 11, s. 6.

ON appeal against an order of two justices removing James Walker from the parish of St. Olave, Southwark, to the parish of St. Mary Magdalen, Bermondsey, both in the county of Surrey, the sessions discharged the order, subject to the opinion of this court upon the following case.

The removal was made upon the examination of the pauper, James Walker, showing that he had gained a settlement in the appellant parish in 1818, by renting a tenement, and stating that he had done no act to gain a subsequent settlement. There were four grounds of appeal; the first objected to the order of removal and examination as insufficient; the second and third denied the settlement stated in the examination; and the fourth, which was the ground applicable to the present case, was in the following terms. "That the said J. Walker, in or about the month of May, in the year 1821, became tenant of a house situate in Fore street, in the parish of St. Clement, in the town or borough of Ipswich, in the county of Suffolk, and hired the same of a Mr. Garrard at the yearly rent of 15*l.*, and occupied and resided therein for upwards of seven months, and paid one or more of the parochial rates or taxes in respect of the said house so situate in Fore street, in the said parish of St. Clement, Ipswich, and thereby gained a settlement in such last-mentioned parish."

\*913]      On the hearing of the appeal, the respondents proved \*the settlement in the appellant parish as set forth in the examination: and the appellants opened their case, setting up a subsequent settlement in the parish of St. Clement, Ipswich. Whereupon the counsel for the respondents objected that the statement of the ground of appeal was insufficient, on the ground that it was not stated therein that the pauper was ever rated to or charged with any parochial rates or taxes. Secondly, that it did not state that the pauper paid his share of parochial rates or taxes. (The third and fourth grounds are not material.) Fifthly, that it did not specify what description of parochial rates or taxes the pauper paid. And, sixthly, that it did not sufficiently state the time at which any such tax was paid by him. The Court of Quarter Sessions was of opinion that the statement of the ground of appeal was sufficient; that it gave the requisite information to the respondent parish with sufficient particularity, and sufficiently stated the constituent parts of the settlement relied upon, and was not calculated to mislead: and, after hearing evidence of the occupation by and residence of the

pauper of and in a house in Fore street, in the said parish (above the yearly value of 10*l.*) from the middle of May, 1821, to the November following, and his continued residence in the said parish, but not in the same tenement, for several months longer, of his being rated to the poor-rate of the said parish in June and September, 1821, for the said house, and of his duly paying such rates respectively in July and October, 1821, they quashed the order of removal, subject to the opinion of this court.

The question for the opinion of the court was, whether the statement of the ground of appeal was sufficient, and gave the requisite information to the respondent parish with sufficient particularity, and was not calculated to mislead: and, if the court should be of opinion that the ground of appeal was sufficiently stated, then the order of sessions was to be confirmed; but if the court should be of a contrary opinion, to be quashed, &c. [\*914]

The certiorari in this case required the justices to send up "all and singular orders, made," &c., "between the Inhabitants of the parish of St. Mary Magdalen," &c., "appellants," and "the Inhabitants of the parish of St. Olave," &c., "respondents, touching the settlement," &c. The order of sessions returned under the writ described the appeal as made "by and on behalf of the churchwardens and overseers of the poor of the parish of St. Magdalen."

*Wallinger*, in support of the order of sessions. First, the appellants are described in the certiorari as "the inhabitants of the parish of St. Mary Magdalen," &c.; in the order of sessions, as "the churchwardens and overseers of the poor of the parish," &c. Proceedings to be removed by certiorari must be properly described in the writ; 2 Nol. P. L. 591; citing *Rex v. Hedingham Sible*, Burr. S. C. 112, and *Regina v. Barking*, 2 Salk. 452. *Regina v. Plint*, 2 Ld. Ray. 820, is to the same effect. The difference is not immaterial; because no person except the parish officers has a right to appeal, at least since stat. 4 & 5 W. 4, c. 76; *Regina v. Colbeck*, 12 A. & E. 161. [Lord DENMAN, C. J. It is the invariable practice at the Crown office to describe appellants in the certiorari in this form. \*M. [\*915] *Chambers*, for the respondents, cited *Regina v. Fordham*, 11 A. & E. 73, 79, 80. [Lord DENMAN, C. J. There is no variance. The churchwardens and overseers are the agents of the inhabitants. And *Regina v. Fordham* is a direct authority as to the time of taking the objection.] As to the fourth ground of appeal, it is true that, to gain a settlement under stat. 3 & 4 W. & M. c. 11, s. 6, a party must "be charged with" as well as "pay" his share of the public taxes or levies of the parish. But here is a virtual, though not a formal, statement that the party was charged. The court will infer the fact, though not expressly stated, on the principle acted upon in *Regina v. Pilkington*, antè, p. 662. It is clear that the premises were rated. [PATTESON, J. To make a good rating, must not some person be rated? Can you rate the house?] According to *St. Mary le*

*More v. Heavytree*, 2 Salk. 478, that may be done.(a) [COLERIDGE, J. How does it appear that any rate was made during the pauper's occupation? He was only seven months in the house. He may have paid the rates the day he came in.] It must be supposed that the rates which he paid were made during his occupation. [Lord DENMAN, C. J. We had rather not draw that inference.]

*M. Chambers*, (with whom was *Corner*,) *contra*, was stopped by the court.

*Per Curiam*.(b)

Order of sessions quashed.(c)

(a) But see, as to this case, *Rex v. Walsall*, Cald. 35, 37.

(b) Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

(c) See the next and two preceding cases.

\*916] \*The QUEEN v. The Inhabitants of the Township of LEEDS.

(WASHTON v. LEEDS.)

Assuming that a wife may be removed to her maiden settlement without her husband by consent of both, such consent is not to be inferred from examinations of the husband and wife taken at the same time before the removing justices, in which the husband states his consent, and the wife says nothing on the subject.

The first examination purported, by the heading, to be taken by the justices touching the settlement of J. M., the husband: other material ones purported to be taken "at the time, place, and in manner, aforesaid:" but one of these related entirely to the wife's maiden settlement, and the order removed her and her children, and not the husband. *Held*, that the examinations were not on that account objectionable, on appeal against the order.

The examinations stated that the husband and a parish officer had diligently inquired in all likely places for the husband's settlement, but had not found any, and believed he had none. *Held*, that the search was sufficiently stated, and that the examinations were not defective for omitting to show with more certainty that the husband had not a settlement in Scotland, Ireland, The Isle of Man, &c., to which he and his family might have been removed under stat. 59 G. 3, c. 12, s. 33.

On appeal against an order of two justices, (dated January 18th, 1843,) removing Lydia Morgan, and Margaret, Thomas, John and Ann, her children, from the township of Leeds, in the borough of Leeds, in the county of York, to the township of Washton, in the North Riding of the said county, the sessions quashed the order, subject to the opinion of this court on the following case.

The examinations on which the said order of removal was made were taken down in writing on the same sheet of paper on which the said order was written, except the examination of George Smith, which was on a separate sheet; and which said examinations were in the words following.

"Borough of Leeds, in the county of York. The examination of John Morgan of Leeds, taken upon oath at the Court House in Leeds, in the said borough, the 18th day of January, 1843, before us, Anthony Titley, and Griffith Wright, Esquires, two of her Majesty's justices of the peace in and for the said borough, touching the place of his last lawful settlement,

Who saith as follows, viz.: I live No. 12 Back Bow street," \* &c. [917  
 "I have a wife called Lydia, whose maiden name was Lydia Miller.  
 I was lawfully married to her at Masham parish church about fourteen years ago. I have four children by her, all born in lawful wedlock; namely, Margaret, aged twelve years, Thomas, aged eight years, John, aged four years, and Ann, aged one year and nine months; all of whom are unemancipated, and never gained a settlement for themselves. I am now living, residing and inhabiting, and have for the last forty days been living, residing and inhabiting, with my said wife and children, in, and we are actually chargeable to, the township of Leeds, aforesaid. I never gained a settlement in my own right. My father and mother were called James Morgan and Ellen Morgan. I never heard where they were married. They neither of them ever gained a settlement in England, or had any place of settlement in England, to my knowledge or belief, either derivative or acquired. I never knew the place of my birth, though I have made diligent search and inquiry to ascertain it. My father died about twenty-four years ago; and my mother died about eight years ago. I am now aged thirty-two years. In the month of October last, I assisted George Smith in endeavouring to discover my place of settlement, and in inquiring after the place of settlement, if any, of my father and mother; and we inquired of all persons, and searched in all likely places, to find a place of settlement for me, but without success; that we could not discover any settlement for me, and I believe I never had any. I hereby consent and agree that my said wife and children shall, without me, be removed to the township of Washton, in the county of York, that being the \*last [918  
 place of her maiden settlement at and immediately before my intermarriage with her: and I pray that such removal may be forthwith ordered and made according to law. John Morgan. Sworn," &c.

"The examination of Lydia Morgan, taken upon oath at the time, place and in manner, aforesaid: who says that I am the wife of the above-named John Morgan, I never gained a settlement for myself. I am now aged thirty-two years. I am the lawful daughter of the under-mentioned John Miller.

"The mark of Lydia  $\bowtie$  Morgan. Sworn," &c.

"The examination of John Miller, taken upon oath at the time, place and in manner aforesaid: who says," &c. (This was the deposition of the wife's father, and related wholly to her maiden settlement.)

"The examination of George Smith, one of the overseers of the poor of the township of Leeds, in the said borough, taken upon oath at Leeds," &c., "on," &c., "before us, two of her Majesty's justices," &c., "touching the last place of the legal settlement of John Morgan and Lydia his wife, and their children; who saith as follows, viz.: That I have, together with the said J. Morgan, made diligent search and inquiry, with the object of discovering and ascertaining whether the said J. Morgan hath any legal settlement; and that I have not been able to discover or ascertain that the said J. Morgan hath, either by his own act, or the act of his parents or their

ancestors, or otherwise, acquired any settlement ; or, if any such settlement have been acquired, I verily believe that the same is not known, and cannot in any manner be ascertained. George Smith. Sworn," &c.

\*919]     \*The following are the grounds of appeal on which the appellants relied. 1. (a) "The said paupers appear on the said examinations to be the wife and unemancipated children of one J. Morgan, and to have been living with him at the time when the said examinations were taken, to wit, on the 18th day of January last ; and it does not appear, on the said examinations, that the said J. Morgan is not a person born in Scotland, or Ireland, or in the Isle of Man, or Scilly, or in either of the Isles of Jersey or Guernsey, or that, being born in one of the countries or isles aforesaid, he has, or has gained, a settlement in England the place whereof is unknown." "And that the said examinations show a greater probability of the said paupers being the wife and unemancipated children of a person born in Scotland or Ireland, or one or other of the said isles, who has not, nor has gained, any settlement in England, than of their being the wife and children of a person born in England who has no settlement in England, or a person who has a settlement in England, the place whereof is unknown, or a person born in any other part of the world than in one or other of the said countries and isles hereinbefore mentioned, or a person born in any of the said countries or isles who once had, but who on the said 18th day of January last had not, any settlement in England." 2. "That the said examinations do not show that any search or inquiry has been made by the overseers," &c., "or by any person or persons whatever, to ascertain whether the said J. Morgan is a person born in Scotland or Ireland, or in the Isle of Man," &c. 3. (In substance.) That \*920] the examinations do not show where or \*how J. Morgan and G. Smith have searched for a place of settlement, or that sufficient search has been made. 4. "That, although the said examinations show that the said Lydia Morgan and her said children were living with her said husband in the said township of Leeds at the time when the said examinations were taken, to wit, on," &c., "yet it does not appear on the said examinations that the said pauper, Lydia Morgan, consented to be removed to the said township of Washton, or consented to be removed at all, without her husband, the said John Morgan." 5. "That the said examinations are informal, insufficient and bad, in respect of other matters besides those to which the preceding grounds of appeal relate, and that the said examinations do not show a good and sufficient cause for the removal of the said paupers from," &c., "to," &c. 6. "That the examinations whereon the said order of removal was made were not duly taken by the said Anthony Titley and Griffith Wright, Esquires, the two justices by whom the said order of removal was made."

When the appeal came on to be heard, the appellants insisted that the

(a) The grounds were stated at considerable length ; the above extracts contain all that is deemed material to this report.

examinations were insufficient to warrant the order, on the fourth ground of appeal above stated. The appellants also claimed a right to insist under the fifth and sixth grounds of appeal, that the order ought to be quashed, inasmuch as it appeared, on looking at the said examinations, including the headings thereof, that the examinations of John Morgan, Lydia Morgan, and John Miller were not taken in the matter to which the order relates; and that the remaining examinations were insufficient to support the said order. No authorities were cited by counsel on either side on any of the above points. On the objections so taken \*under the fourth, fifth and sixth grounds of appeal, the sessions quashed the order, subject to the opinion of this court. The appellants also insisted that the examinations were insufficient to warrant the said order on the first, second and third grounds above stated. The sessions expressed an opinion against these objections, but gave leave to the appellants to include those other grounds as well as the objections taken under the fourth, fifth and sixth grounds in the case. [\*921]

If this court should be of opinion that all the objections so taken by the appellants ought to have been overruled, then the order of sessions was to be quashed and the order of removal to be affirmed. If the court should think the objections or any of them fatal to the order of removal, then the order of removal to stand quashed, and the order of sessions to be affirmed.

The case was argued in this term. (a)

*Bliss* and *Stapleton*, in support of the order of sessions. 1. As to the separation of husband and wife: assuming that the wife consented, the separation was lawful according to *Rex v. Eltham*, 5 East, 113: but the authority of that case was much questioned in *Rex v. Leeds*, 4 B. & Ald. 498; and the decision may probably be reviewed. (The judgment of the court makes it unnecessary to report this part of the argument more fully.) 2. Even if the power to separate husband and wife existed, the justices, before exercising it, should have satisfied themselves that the husband was not born in Scotland or Ireland, or any other of the places mentioned in stat. 59 G. 3, c. 12, s. 33, in which case the family might all have been removed together. \*3. By the examinations it appears that the justices made their order without inquiring into any settlement but that of John Morgan; for all the examinations, except Smith's, are headed as referring to John Morgan's settlement only; and Smith's does not in fact relate to any other. [\*922]

*R. Hall* and *Pashley*, contrà. As to the third objection; the proper subject of inquiry in the first instance was the settlement of the husband. His examination professes to turn upon that; the next two are not headed as relating to any settlement. And it is the complaint that determines the subject matter of inquiry. Before stat. 4 & 5 W. 4, c. 76, no dispute of this kind could have arisen; for no written examinations were necessary: the only

question would have been what was the complaint, and what order was drawn up. And now, that which is termed the caption is no necessary part of the examinations, but is simply an ear-mark. An examination is merely the minute of a person taking down answers, not, like an affidavit, a document deriving its effect wholly and independently from the matter contained in it. The distinction is pointed out in *Caudle v. Seymour*, 1 Q. B. 889. If there was a mistake here, it is not more material than that in *Regina v. Silkstone*, 2 Q. B. 520, which the court held not to be fatal. As to the possibility of a settlement in Scotland or Ireland, the examinations state enough to throw the burden of proving such a settlement on the other side. On a question as to the settlement of a child, it has been held that the maiden settlement of the mother prevailed against the birth settlement, though it was not ascertained whether \*or not the father had a settle-  
 \*923] ment; *Rex v. St. Mary, Leicester*, 3 A. & E. 644. The mother's maiden settlement, therefore, in a case like the present, must be looked to, rather than the alleged possibility of the father being a native of Ireland or Scotland. [PATTERSON, J. The objection seems to be that, before this order was made, the register of every parish in the kingdom should have been searched.] As to the separation of husband and wife, the wife's consent is not stated on oath, nor is that necessary: all the parties were before the removing justices; the husband, in the wife's presence, consented to the separation, and prayed that the removal might be ordered. It is sufficient that she acquiesced. It must be taken that this was evidence of consent with which the removing justices might be satisfied. And, if such consent was given, the removal is justified by the decision in *Rex v. Eltham*, 5 East, 113, which has never been overruled, and is supported by note (a) to *Rex v. Eastbourne*, 4 East, 103. (The further argument on this point is omitted.) At all events the two children who are above the age of nurture must be removed to the maiden settlement. *Cur. adv. vult.*

Lord DENMAN, C. J., in the ensuing vacation, (May 10th,) delivered judgment as follows:

The endeavour in this case was to induce the court to review the decision in *Rex v. Eltham*. But the point cannot arise, for want of any statement of consent on the part of the wife. The rule for quashing the order of sessions must therefore be discharged.

Order of sessions confirmed.

\*924] \*Lord DENMAN, C. J., in Trinity term, (June 3d,) 1844, delivered the further judgment of the court as follows:

In this case the order of sessions was confirmed on the single ground that the wife had not consented to be removed without her husband, and that, at all events, such consent was necessary to a valid removal, assuming that it would be valid under any circumstances. The court did not then recollect that this ground of decision does not apply to two of the children, who are above the age of nurture. As to them it becomes necessary to consider the other points of the case.

One of them arises upon the examinations of the father and mother, and one Miller, which it is said were taken, as appears by the heading, touching the lawful settlement of the father; whereas the order of removal is of the wife and children to the wife's maiden settlement, and the examinations should have been headed accordingly. We think that this point is not tenable. An inquiry into the father's settlement was necessary in this case, and was the foundation of the proceedings; for, until it appeared that his settlement could not be discovered, the wife's settlement was immaterial; and, when it did so appear, the rest of the inquiry followed as of course. The heading of an examination may doubtless be important with regard to an indictment for perjury, and for the purpose of showing that it was taken in a matter where the justices had jurisdiction. Here the heading sufficiently shows jurisdiction: and it is true so far as it goes; for there was an inquiry touching the settlement of the father; but there was also a further inquiry, arising out of the first inquiry, which is not noticed in the heading. If that further inquiry had been unconnected with the first, the \*case would have been very different; but, as it is, we think it to have so entirely arisen out of that first inquiry, that we must hold the examination to have been sufficiently taken and headed. [\*925]

The second point is also untenable. It appears from the examinations that diligent inquiries were made to ascertain the father's settlement. The precise nature of those inquiries need not be stated. Then it is said that these examinations do not negative the father's having been born in Scotland or Ireland, or Scilly, or Guernsey, or Jersey. The answer is, that they show it is not known where he was born. It is obviously impossible to negative his birth in the places mentioned, except by showing where he was born. It would be absurd to require a search in every town and village in Scotland, Ireland, &c.; and, even if such search were made, the result would be any thing but certain. The same answer applies as to the supposed necessity for searching every parish register in England.

We are therefore of opinion that the order of removal is good, and ought to have been confirmed, so far as regards the two children above the age of nurture, and that, to that extent, the order of sessions ought to be quashed; out to remain confirmed as regards the wife and the other children: and the rule of this court must be amended accordingly.

Order of sessions quashed as to the two elder children; in all other respects, confirmed. (a)

(a) See the three preceding cases.

## \*926] \*The QUEEN v. RICHARDS, BIRD, and Others.

The return to a habeas corpus stated that the prisoner was committed for three months by warrant of a justice, (set forth in the return,) reciting a conviction by the justice, on which the warrant purported to proceed, for an offence under stat. 4 G. 4, c. 34, s. 3. The recited conviction was, on the face of it, bad. The return then stated that, a week after such commitment, the prisoner being still in custody, the same justice delivered to the jailer another warrant of commitment reciting, and grounded upon, a conviction of the same date as the first, by the same justice, setting forth the same offence, and imposing the same punishment. In this conviction no material defect appeared.

*Held*, that the prisoner was not entitled to be discharged, the return showing a good warrant under which he was in custody.

A HABEAS corpus issued in this term, commanding the keeper of the house of correction at Leicester to bring up the bodies of Joseph Richards, John Bird, James Walker and William Bird, committed and detained in the said prison, with the days and causes of their being detained, &c., to undergo, &c. The keeper returned as follows:

Leicestershire, to wit. I, John Allen, the keeper, &c., do certify and return, &c., that, before the coming to me of the said writ, that is to say, on the 8th day of April, A. D. 1844, James Walker and William Bird, in the same writ also named, were severally committed to my custody by virtue of a certain warrant of commitment, the tenor of which is as follows: "Leicestershire to wit. To the constable of Worthington, in the said county, and to the keeper of the house of correction at Leicester in the said county. Whereas information and complaint hath been made before me, William Wootten Abney, Esq., one of Her Majesty's justices of the peace in and for the said county, by Benjamin Walker, of Worthington, in the said county, coal master, upon the oath of the said B. W., against James Walker and William Bird, late of Worthington, aforesaid, in the said county, colliers to the said B. W., at his Smorle colliery, that they the said James Walker and William Bird have, in their said service, severally been

\*927] \*guilty of a certain misconduct, misdemeanor, miscarriage and ill behaviour towards him the said B. W., in that they the said James Walker and William Bird, having severally entered into their service, have severally therein not fulfilled their contract, by having, at the township of Worthington, in the said county, on the 4th day of April, instant, severally neglected their work in such service contrary to the statute 4 G. 4, c. 34, s. 3. And whereas, in pursuance of the statute," &c. "I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined that they the said James Walker and William Bird have, in their said service, severally been guilty of a certain misconduct, misdemeanor," &c., "towards the said B. W., in that they, the said James Walker and William Bird, having severally entered into their said service, have severally therein not fulfilled their said contract, by having, at the township," &c., "on," &c., "severally neglected their work in such

service, contrary to the statute. (a) And I do therefore convict them the said James Walker and William Bird of the said offence, in pursuance of the statute (a) in that case," &c. "These are therefore to command you the said constable forthwith to convey the said James Walker and William Bird to the said house of correction at Leicester aforesaid, and to deliver them to the keeper thereof, together with this warrant. And I do hereby command you the said keeper to receive the said James Walker and William Bird into your custody, in the said house of correction, there severally to remain and severally \*to be kept to hard labour for the space of three [\*928 months from the date hereof, and for your so doing this shall be your sufficient warrant. Given under my hand and seal the 8th day of April, A. D. 1844. William Wooten Abney." (L. s.) "And I do further certify," &c. The return then certified that on the same 8th of April, 1844, Joseph Richards and John Bird, in the same writ named, were severally committed to the keeper's custody by virtue of a certain warrant of commitment, &c., set forth in the return, and exactly like the preceding, except in the names of the parties committed. It then proceeded as follows:

And that afterwards and whilst the said James Walker, William Bird, Joseph Richards, and John Bird, were respectively so in my custody, that is to say, on the 15th day of April, A. D. 1844, the said William Wooten Abney caused to be delivered to me a certain other warrant of commitment, the tenor of which is as follows: "Leicestershire, to wit. To all and every the constable and other officers of the peace for the said county whom these may concern, and to the keeper of the house of correction at Leicester in the said county. These are in her Majesty's name to command you, and every of you, the said officers, forthwith safely to convey and deliver into the custody of the said keeper the body of James Walker, late of Worthington, in the said county, collier, being convicted before me W. W. A., Esq., one of her Majesty's justices of the peace in and for the said county, upon the evidence on oath of Benjamin Walker, of Coleorton, in the said county, for that he the said James Walker did contract with the said Benjamin Walker to serve him in the capacity of a collier for an indefinite period, determinable nevertheless on either of the said \*contracting [\*929 parties giving to the other fourteen days' previous notice of his intention to determine the said contract, and that the said James Walker did enter into the service of the said B. W., and did continue to serve him the said B. W., and to be employed by him as a collier, under and according to the said contract, at the township of Worthington, in the said county of Leicester, so being then and there in the service of him the said Benjamin Walker as a collier, until the 4th day of April, instant, and, the term of the said contract being then subsisting and incomplete, he the said James Walker did misconduct and misdemean himself in his said service, to wit, did neglect his work and refuse to go to it on being requested by the said B. W. so to do, whereby divers other persons employed in the said pit

(a) 4 G. 4, c. 34, s. 3.

were prevented from proceeding with their ordinary employment, and the said B W. sustained great damage and loss, contrary to the form of the statute in such case," &c. : "for which said offence I the said justice have ordered and adjudged the said James Walker to be imprisoned in the house of correction at Leicester in and for the said county, and there kept to hard labour for the space of three months; and you the said keeper are hereby required to receive the said James Walker into your prison, and him there safely to keep for the aforesaid term of three months, and during that time to be kept to hard labour, and for your so doing this shall be to you and every of you a sufficient warrant. Given under my hand and seal at Swepstone, in the said county of Leicester, this 8th day of April, A. D. 1844. William Wootten Abney." (L. s.) "And also a certain other warrant of commitment, &c." The return then set out three other warrants precisely

\*930] similar, except in the \*names of the parties committed, against William Bird, Joseph Richards, and John Bird; "and that the said James Walker, in the first warrant mentioned, is the same James Walker as in the said third warrant mentioned." (The return then identified the other three parties respectively with those mentioned in the former warrants.) "And these are the causes of detaining the said James Walker," &c.; "whose bodies I have here ready as by the said writ I am commanded.

"The answer of John Allen, keeper of the house of correction."

The return having been read, *Bodkin* moved that the prisoner John Bird might be discharged from custody. The cases being all alike, counsel were heard in this only, and its result decided the rest.

*Bodkin*, *Fry*, and *Huddleston*, for the prisoner. On this return it must be taken that the convictions relied upon are contained in the first two warrants. But these clearly show no good conviction. It does not appear by them that the justice is acting at any place within his jurisdiction. [PATTERSON, J. Each of them convicts two men jointly of several offences under several contracts.] (*Whitehurst* admitted that the first two instruments did not contain good convictions; mentioning, as an objection, that they did not set out the evidence.) Then, if the latter warrants are to be looked to as reciting the convictions, it appears by the return that the defendants are convicted of one offence and committed for another; and, if this is so, the commitment cannot be supported, even though it recite a good conviction; *Rogers v. Jones*, 3 B. & C. 409. (a) It may be admitted that the \*931] \*justice had power to substitute a good warrant for the defective one: but then it ought distinctly to appear by the second warrant that the justice means to withdraw the first, and act upon this in its stead; *In the Matter of Elmy and Sawyer*, 1 A. & E. 843. But further, the second warrant, here, does not show a valid conviction. The refusal to serve is stated without any assignment of time or place. It does not appear that the convicting magistrate was (according to stat. 4 G. 4, c. 34, s. 3) a justice of the county or place where the servant contracted or was employed

(a) S. C., at *Nisi Prius*, with the documents set out, Ry. & M. 129.

or found. Nor is it shown that the contract was such as to establish the relation of master and servant between the parties. This objection prevailed in *Lancaster v. Greaves*, 9 B. & C. 628, and *Hardy v. Ryle*, 9 B. & C. 603.

*Whitehurst*, contra. The language of the warrant clearly shows a contract as between master and servant within the terms of the statute. It also states that the party convicted did enter into the service of Walker, and did continue to serve him, and to be employed by him as a collier, under the said contract, at the township, &c., until the 4th of April, 1844, and, the term of the said contract being then subsisting, &c., he misconducted himself in his said service, to wit, did neglect, &c. These averments sufficiently show time, place, and the nature of the contract. As to the jurisdiction, the magistrate is described as one of her Majesty's justices "in and for the said county:" this is the form commonly used in stating the complaint on which a pauper is removed, and in other similar cases; and, with the marginal venue, and the conclusion, "given," &c., "at \*Sweptstone, in the said county of Leicester," it sufficiently shows [\*932 that the justice is acting within the proper jurisdiction. Then the whole question is, whether the court, seeing a good warrant of commitment returned to the habeas corpus, can discharge the prisoner. It is true that the jailer has returned former warrants; but they are not necessarily connected with these. It is conceded on the other side that a good warrant may be substituted for a bad one; but it is contended, on the authority of *In the Matter of Elmy and Sawyer*, 1 A. & E. 843, that the intention to do so must appear on the face of the second warrant. In that case, however, the substitution was alleged to have been made on the authority of an act of parliament, (3 & 4 W. 4, c. 53, s. 90,) enabling justices to amend their warrant; but it did not appear on the return to the habeas corpus that the statute had been acted upon, or any amendment made by the justices; and the decision proceeded on that ground. Here the jailer has, at the time of the return, a good warrant from the committing justice: how many bad ones he may have had before is immaterial to the present purpose: the informal ones are merely waste paper. Whether an action of false imprisonment would lie for the detention from April 8th to April 15th, is a question which does not arise now. (He was then stopped by the court.)

LORD DENMAN, C. J. I think you are right. It is impossible not to see that the jailer has returned good warrants, upon which the parties may lawfully be detained.

\*PATTESON, J. There must be something in the nature of a judgment to authorize a detention under the statute: but here are [\*933 warrants showing a conviction; and the act does not require more.

WILLIAMS and WIGHTMAN, Js., concurred. Prisoners remanded.

## The QUEEN v. TORDOFT.

A summary conviction is bad which does not show that the evidence was given in the presence of the party charged.

The same rule applies to warrants of commitment which operate in themselves as convictions; as a committal under the Artificers' Act, 4 G. 4, c. 34, s. 3, of a workman absenting himself from his service.

A committal of T., under the above clause, set forth that "information and complaint hath been made before me," (the justice,) "by F.," "upon the oath of F.," "for that," &c., (stating the charge:) "and whereas the said T., in pursuance of my warrant for that purpose, hath this day appeared before me to answer the said complaint, but hath not proved that he is not guilty of the said complaint and charge: and whereas, in pursuance of the statutes in that case," &c., "I have duly examined the proofs and allegations upon oath of both the said parties touching the matter of the said complaint; and, upon due consideration had thereof, have adjudged and determined the said complaint to be true, and that," &c., (affirming the charge:) "and I do therefore convict him, the said T., of the said offence, in pursuance of the statutes in that case," &c.: "these are therefore to command you," (the constable,) &c.

The above warrant being alone returned to a habeas corpus ad subjiciendum: *Held*,

(1) That it did not show that the evidence was given in the presence of T.

(2) That the court could not assume that there was a distinct conviction, free from the objection.

Prisoner discharged.

ISAAC TORDOFT, being in the custody of the governor of the house of correction at Wakefield in the West Riding of Yorkshire, was brought up by habeas corpus ad subjiciendum. The governor returned that Tordoft was confined in his custody under a warrant, which he set forth, and the material parts of which are as follows:

"To George Kershaw, the constable of Barnsley, in the West Riding," &c., "and to the keeper of the house of correction at Wakefield in the said West Riding," &c.

\*934] "Whereas information and complaint hath been made before me, William Bennet Martin, Esq., one of Her Majesty's justices of the peace in and for the West Riding, &c., by Andrew Faulds, of," &c., "a colliery proprietor, upon the oath of the said A. F., against Isaac Tordoft, late of," &c., "collier, for that he the said Isaac Tordoft, having contracted with the said A. F. and others, his partners in trade as colliery proprietors, to wit, on the 1st day of January, A. D. 1842, in the West Riding aforesaid, to serve them, the said A. F. and others, in the said capacity and employment of a collier, in the said West Riding, and from thence until the end of one month after he should have given to or received from his said masters notice to quit and leave his said masters' service: and that the said Isaac Tordoft, in pursuance of the said contract, entered into the service of the said A. F. and others accordingly; and that afterwards he did unlawfully absent himself from his said service, without his said masters' consent, in the Riding aforesaid, to wit, on the 23d, 24th, 26th, and 27th days of February last past, respectively, before the time of his said contract was completed, to wit, after the commencement of the said contract and before the end of one month after he had given to or received from his said master notice to quit and leave his said masters' service, and hath from thence hitherto neglected to fulfil his said contract, against the

form of the statutes in such case," &c.: "and whereas the said Isaac Tordoft, in pursuance of my warrant for that purpose, hath this day appeared before me to answer the said complaint, but hath not proved that he is not guilty of the said complaint and charge: and whereas, in pursuance of the statutes in that case," &c., "I have duly examined the proofs and allegations \*upon oath of both the said parties touching the matter of the said complaint; and, upon due consideration had thereof, have [\*935 adjudged and determined the said complaint to be true, and that he the said Isaac Tordoft did contract with the said A. F. and others to serve them, the said A. F. and others, as aforesaid, in the Riding aforesaid, and did afterwards absent himself from the said service before the time of his said contract was completed as aforesaid, to wit, on the several days aforesaid, in the year aforesaid: and I do therefore convict him, the said Isaac Tordoft, of the said offence, in pursuance of the statutes in that case," &c.: "These are therefore to command you, the said George Kershaw, forthwith to convey the said Isaac Tordoft to the said house of correction at Wakefield aforesaid, and to deliver him to the keeper thereof, together with this warrant: And I do hereby command you, the said keeper, to receive the said Isaac Tordoft into your custody in the said house of correction, there to remain and be held to hard labour for the space of three months from the date hereof: and for your so doing this shall be your sufficient warrant." (The warrant then stated that it appeared that no wages were or would be due, and that the justice made, therefore, no order to abate.)

"Given under my hand and seal, at," &c. (6th March, A. D., 1844.) (Signed and sealed.)

On a former day in this term, (a)

*Bodkin*, with whom were *Fry* and *Huddleston*, moved that the prisoner might be discharged, and (among \*other objections) urged that it did not appear by the warrant that the witnesses had been examined in the prisoner's presence. The court then called on the other side to answer this objection. [\*936

*Erle, E. Yardley* and *Overend*, contra. It does appear, by a reasonable construction of the warrant, that the witnesses were examined in the presence of the prisoner. It states that, in pursuance of the previous warrant, the prisoner "hath this day appeared before me" (the justice) "to answer the said complaint, but hath not proved that he is not guilty:" and that "I have duly examined the proofs and allegations upon oath of both the said parties," &c. Unless the court assume that there have been two distinct proceedings, the proof must have been given on the hearing at which the prisoner "appeared." And, as stat. 4 G. 4, c. 34, s. 3, does not require a formal conviction, but only a warrant and examination and committal thereupon, this warrant of committal is not to be subjected to so strict a construction as formal convictions, or committals grounded upon such convictions

(a) April 29th. Before Lord Denman, C. J., Patteson, Williams and Wightman, J.

The form in 5 Burn's Justice, tit. *Servants*, s. 12, No. 19, 29th ed., p. 934, does not contain any fuller statement. [PATTESON, J. Has it ever been held that such a form is correct, even where the committal itself is in the nature of a conviction? Lord DENMAN, C. J. Every allegation here might be satisfied though the evidence was given in the absence of the prisoner.] In *Johnson v. Reid*, 6 M. & W. 124, a committal under this act was objected to, on the ground that it did "not allege that the party was \*937] present and was convicted." The committal was held bad on \*another objection: but PARKE, B., said: "It does not appear here that there was any conviction, and that is not required by the statute. This is a commitment which was intended by the act to operate as a conviction." The general rule, that the evidence must appear to have been given in the defendant's presence, is stated in Paley on Convictions, p. 143, (ed. 3;) and the cases are there collected, as to what shall raise the presumption that the fact was so. He says: "The weight of precedent seems to justify the conclusion, that wherever the defendant's appearance and the evidence were stated to have taken place on the same day, the presumption was in favour of the whole having passed in his presence." And, after examining the early cases, (a) the author repeats the rule at p. 146, and states that it is confirmed by the later authorities, which he adds. (b) If, indeed, it can be considered that there has here been a distinct conviction before the committal now returned, there is still stronger reason for supporting the committal. Committals in general are not construed with the strictness applied to convictions. "The Court of King's Bench will not criticise a warrant of commitment with the same strictness to which a conviction is subjected, if there be reasonable ground for presuming that the conviction (on which the commitment is founded) is free from objection:" Paley on Convictions, p. 236. [PATTESON, J. But here the warrant uses the expression, "I do therefore convict."] The words may signify only that the justice adheres \*938] to the conviction which he made on the \*hearing. The present tense was formerly used more commonly than the past to denote judicial acts persisted in from one time to another: but in *Rex v. Hall*, 1 T. R. 320, the court upheld a conviction using the words *came and gave me to understand and be informed*, the information having preceded the conviction. Here there are earlier words, "I have" "adjudged and determined." The words "I do therefore convict" might be rejected. But, even if there be no conviction except in the warrant itself, it may be argued that the legislature does not here intend that the evidence should be set out, since they have not required a separate conviction, which is the document whereon the evidence ought to appear. It is as if a conviction were required, but the certiorari taken away: that is done where the intention is that the convic-

(a) *Rex v. Baker*, 3 Str. 1240; *Rex v. Vipont*, 3 Burr. 1163.

(b) *Rex v. Atkin*, 3 Burr. 1785; *Rex v. Kempson*, 1 Cowp. 241; *Rex v. Thompson*, 3 T. R. 18; *Rex v. Pearce*, 9 East, 358; *Rex v. Benwell*, 6 T. R. 75; note (a) to *Rex v. Stone*, 1 East, 648; *Rex v. Lovet*, 7 T. R. 152; *Rex v. Crisp*, 7 East, 389, 393; *Rex v. Swallow*, 8 T. R. 284.

tion shall not be subjected to technical objections. Here the language of the statute has been pursued. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

The court desired time to consider one of the objections preferred against the warrant of commitment under which this applicant was imprisoned.

His offence appears to have been *absenting himself from the service for which he had contracted*, under stat. 4 G. 4, c. 34, s. 3; an offence of which it seems a party may be duly convicted on the face of the instrument itself which consigns him to an imprisonment; *Johnson v. Reid*, 6 M. & W. 124. (a) It is however necessary to the validity of that course of proceeding that the warrant of \*commitment should show that the magistrate has done [\*939 all that is necessary to make the conviction lawful.

For the prisoner it was contended that that cannot be, unless the witnesses against him appear to have been examined in his presence. In this principle we fully concur: the learned counsel for the Crown did not dispute it, but argued that the witnesses against the prisoner do sufficiently appear by the warrant to have been examined in his presence; relying on the case of *Rex v. Baker*, 2 Str. 1240, and on numerous decisions which have followed it. (b)

We have examined those cases, which afford an example of the inconvenience of departing from those rules of procedure which are founded on the principles of criminal justice. No possible mischief, except the escape of one offender for a single defective conviction, could have arisen from requiring a plain statement in all summary convictions that the witnesses were examined in the prisoner's presence. It is remarkable that the statute which gives the more general form (c) requires that statement to be expressly made. But equivalents have been admitted, though with regret, by so many learned judges, that the court is compelled to take the trouble of sifting the details of each conviction, to discover whether some words there do not import that essential fact. On minutely looking at the language of the commitment before us, we do not find that fact, but infer the contrary.

A complaint was previously made on oath against the prisoner: he was then summoned and "hath not proved that he is not guilty of the said complaint and charge," \*according to the statement of the magistrate, [\*940 who adds, "in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations upon oath of both the said parties touching the matter of the said complaint; and, upon due consideration had thereof," &c.

As the information on oath was previously before the magistrate, who states that he required the prisoner to answer it by proof that he was not guilty, we think the natural construction is that no other allegation or proof was brought against the prisoner. Consistently with the recitals, no viva

(a) See *Ex parte Johnson*, 7 Dowl. P. C. 702.

(b) See Paley on Convictions, p. 143, (3d ed.)

(c) Stat. 3 G. 4, c. 23, s. 1.

voce evidence may have been adduced against him. But, if there were, nothing was urged as showing that it was given in his presence, except the order of time in which the proceedings are set forth in the document. We are clearly of opinion that none of the cases decided would justify us in making that presumption. (a)

We cannot at all accede to the argument that this commitment is a distinct act from the conviction, which ought to be presumed good, though neither returned nor recited. If there was such a conviction in fact, it ought to have been drawn up in proper form. But the warrant of commitment is alone before us: we think it insufficient; and the prisoner is entitled to be discharged.

We say nothing on the other grounds of objection.

Prisoner discharged.

(a) See *Rex v. Selway*, 2 Chitt. 522.

**\*941] \*ROBERTSON and Another v. Sir WILLIAM JOHN STRUTH, Knight.**

A declaration in debt on the judgment of a foreign court need not state that the court had jurisdiction over the parties or cause.

DEBT. The declaration stated that plaintiffs, to wit, at the Supreme Court of Judicature of our sovereign Lady the Queen, holden at the Court House in Kingstown in and for the island of St. Vincent, and within the jurisdiction of the said court, heretofore, to wit, on the 18th of April, A. D. 1843, before the Honourable JOHN PETERSON, Chief Justice of the said court, by the consideration and judgment of the same court, recovered against the said defendant, by the name and addition of, &c., the sum of 812*l.* 10*s.* 3*d.* sterling money, that is to say of lawful money of Great Britain, for their damages which they had sustained by occasion of the non-performance of certain promises and undertakings before that time made by defendant to plaintiffs, and by the said court there to the said plaintiffs adjudged, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said Supreme Court of Judicature in the said island of St. Vincent fully appears; and which said judgment still remains in that behalf in full force, &c., and not in anywise satisfied, reversed, &c.; and plaintiffs have not obtained any satisfaction, &c.: by means of which several premises defendant then became liable to pay plaintiffs the said sum, &c., so adjudged to them in manner and form aforesaid, on request: whereby, and by reason of the non-payment thereof, an action hath accrued, &c.

General demurrer, and joinder.

**\*942]** *\*Martin*, for the defendant. The declaration is bad because it does not show that the defendant was ever subject to the jurisdiction of the foreign court. It does not appear that he was at any time within the

island of St. Vincent, or that the cause of action accrued there. *Collett v. Lord Keith*, 2 East, 260, shows the particularity required in such a case. The Supreme Court of St. Vincent's is not one established by act of parliament: its judgment is that of a body with which this court is unacquainted. [PATTESON, J. We presume that the judgment of a foreign court is correct. If you have any objection, ought not it to have been raised by plea?] After the decision in *Ferguson v. Mahon*, 11 A. & E. 179, it would seem that the declaration ought to show expressly the jurisdiction of the foreign court over the cause.

*Bovill*, contra. The form here is that which has always been used, and agrees with the precedent, in 2 Chitty on Pleading, 305, 7th ed., of a count upon a Jamaica judgment. The court is stated to be the Supreme Court of Judicature of St. Vincent's: and the rule is that her Majesty's courts here will consider the judgment of a foreign court to be regular unless the contrary be conclusively shown; *Cowan v. Braidwood*, 1 Man. & G. 882, 895, judgment of MAULE, J.; *O'Cullaghan v. Marchioness Thomond*, 3 Taunt. 82. The case of such a court is analogous to that of the courts of counties palatine in this country, or the court of the franchise of Ely, the jurisdiction of which need not be expressly shown in pleading, because they are original superior courts; *Peacock v. \*Bell*, 1 Saund. 73; *Pigge v. Gardner*, 1 Lev. 208. The judgment is a *prima facie* case for the plaintiff: if the defendant relies on a want of jurisdiction, he must show it by a plea, as was done in *Ferguson v. Mahon*, 11 A. & E. 179: he cannot raise the question by a demurrer, especially by a general one. *Collett v. Lord Keith*, 2 East, 260, was not decided on the ground here taken: the question arose upon a plea of justification, where more strictness is required than in a declaration. The original action here was on a contract; and a foreign court would have jurisdiction over such a cause of action wherever arising. [Lord DENMAN, C. J., referred to the judgment of TINDAL, C. J., in *Obieini v. Bligh*, 8 Bing. 335; S. C. 1 Moore & Scott, 477. PATTESON, J. There the proceedings abroad were objected to as part of the plaintiff's case on the trial.] [\*943]

*Martin*, in reply. The jurisdiction of the county palatine courts and that of Ely are judicially known to the courts at Westminster. They cannot know what is within the jurisdiction of a foreign court. It is true that the form used in this declaration has been common; but the assumption of its correctness is not decisive. There has, in fact, been much difference of opinion on the subject. It was formerly supposed that the validity of a foreign judgment could not be questioned unless for a defect apparent on its face. [WIGHTMAN, J. The plaintiff here only contends that the judgment is *prima facie* evidence; and it was laid down in *Sinclair v. Fraser*, (a) and the doctrine was recognised \*by Lord MANSFIELD, in *Walker v. Witter*, 1 Doug. 1, that the judgment of the court of Jamaica, in an action for a debt is *prima facie* evidence of the debt, "though it is compe- [\*944]

(a) Cited on the Trial of the Duchess of Kingston, 20 How. St. Tr. 468.

tent to the defendant to impeach the justice of the judgment, by showing it to have been irregularly, or unduly, obtained.”(a)

LORD DENMAN, C. J. That clearly is so. The judgment must be for the plaintiff.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Judgment for plaintiff.

(a) 1 Doug. 4, 6. And see p. 4, note [1.]

### The QUEEN v. JOHN HINDE.

If a person is found drowned in a river within the concurrent jurisdiction (exclusive of all others) of the coroner for a city and the Admiralty, and the body is taken to a place on shore beyond the city limits, the coroner and jury of the city cannot view the body at such place for the purpose of an inquest; and an inquisition taken on such view will be quashed. So held on an inquisition taken after stat. 6 & 7 Vict. c. 12.

AN inquisition, taken on the 12th December last, before James Lewis, gentleman, her Majesty’s coroner for the city of Rochester, on view of the body of Edward Byrne, then lying dead, was removed into this court by certiorari; and Jervis, in last term, obtained a rule calling on Mr. Lewis to show cause why the inquisition should not be quashed.

The motion was made at the instance of John Hinde, Esq., coroner for the county of Kent. Rules were also obtained to quash two other inquisitions taken by Mr. Lewis, on the bodies of John Webster and Patrick Nowland. The facts of the latter cases did not differ in any material respect from those of the first, and the \*parties agreed that all should be governed by the decision in that of Byrne.

The inquisition in Byrne’s case was as follows.

“City of Rochester,  
in the county of  
Kent, to wit. } An inquisition indented, taken for our sovereign Lady the Queen, at the house of Frederick James Ladd, called The Ship Inn, in the parish of Chatham, in the city aforesaid, in the county aforesaid, on the 12th day of December, in the seventh year of the reign,” &c., “before James Lewis, gentleman, coroner of our said Lady the Queen, for the said city, on view of the body of Edward Byrne, late seaman in the navy, now lying dead in the parish of Chatham aforesaid, in the said county, upon the oath of James Clisson,” &c., “good and lawful men of the said city duly chosen, and who, being now here duly sworn and charged to inquire,” &c., “do upon their oath say that the said E. Byrne, on the 11th day of December, in the year aforesaid, at the parish aforesaid, in the city aforesaid, in the county aforesaid, in the river of Midway, there was found suffocated and drowned; but how or by what means he came by his death no evidence thereof doth appear to the said jurors. In witness whereof as well the coroner as the jurors aforesaid have to this inquisition set their hands and seals the day, year and place first above written. James Lewis, coroner,” &c.

It appeared by the affidavits that Mr. Lewis, as coroner for the city and

nor ough, claimed jurisdiction (which was not disputed in the present cases) to hold inquests on all deaths happening in the river Medway, and on all bodies found dead upon or within that river, and any creeks and branches thereof within the flux and reflux of the tide. The body of Edward Byrne was found in the Medway, on December 11th, 1843, within Mr. Lewis's \*jurisdiction, and was first brought to land in the county of Kent, [\*946 beyond that jurisdiction, and placed in a hospital there. It was viewed in the county by Mr. Lewis, and a jury of the city, summoned to inquire into the cause of the death: but (as Mr. Lewis deposed) "all the proceedings on the inquest," "except viewing the body," took place within the city. Before the passing of stat. 6 & 7 Vict. c. 12,(a) it had been usual for the coroner of Rochester, when bodies were found in the Medway, and brought on shore in the county of Kent, to view there, and take the other proceedings in the city. Mr. Lewis's affidavit stated: "That the said river Medway, from Rochester Bridge to Sheerness, is within the jurisdiction of the Admiralty of England, who appoint a gentleman residing at Rochester to be deputy coroner of the Admiralty upon the said river, and which deputy coroner has concurrent jurisdiction with this deponent upon the said river, though it has been customary for such deputy coroner, during the time deponent has held his said office, and as he believes previously, not to act."

*Platt and Bodkin* now showed cause. The second enacting clause of stat. 6 and 7 Vict. c. 12, s. 1, does not \*apply, because a deputy [\*947 coroner for the Admiralty had jurisdiction over the river Medway, in which the body was found. The words in the first part of the section are general, but are restrained by the preamble. The inconveniences there recited are, "that it is unknown where persons lying dead have come by their deaths;" and "that such persons may die in other places than those in which the cause of death happened." *Regina v. The Great Western Railway Company*, 3 Q. B. 333, was a case of the latter description, decided shortly before the passing of the statute; and the intention was that, in those particular cases, the body should not be carried back into the county where the death happened for the purpose of an inquisition. [PATTERSON, J. In 2 Hale's P. C. 66. Part II., c. 8, it is said: "In ancient times if a man were hurt in the county of A. and died in the county of B., the coroner of the county of B. could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of A. take an inquisition, because the body was in the county of B., but

(a) "For the more convenient holding of coroners' inquests." Sect. 1 is as follows: "Whereas it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened: Be it enacted," &c., "That the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land."

they used to remove the body into the county of A. and there the coroner of that county to take the inquisition.”] Hale says,(a) that the inquisition must be “*super visum corporis*; but not that it must be actually held *super corpus*. It is not essential that the inquisition itself should be held where the view was taken. [COLERIDGE, J. The passage first cited shows that it was not thought material where the death happened, but where the body was. PATTESON, J. A little farther on,(a) it is said that, “if he were stricken and had also died in the county of A., and the body  
 \*948] had \*by some means been after removed into another county, he ought to be removed into the county of A. where he was stricken and died.” And the statute says that the coroner “only within whose jurisdiction the body” “shall be lying dead shall hold the inquest.” Lord DENMAN, C. J. The coroner of Kent ought to have summoned a jury to inquire on view of the body lying in the parish of Chatham, in that county.] The death, and the cause of it, happened in a place over which the city coroner, and not the county one, had jurisdiction. The mere fact of the body being landed in Kent could not in such a case give authority to the coroner of Kent. [PATTESON, J. To give the city coroner jurisdiction the body should have been removed from the county into the limits of the city. Hale says that, in the case put by him, the coroner of A. could not inquire, “because the body was in the county of B.”] In the second clause of stat. 6 and 7 Vict. c. 12, s. 1, it is expressly said that, if a body is found dead in a river within the flowing of the sea, where there is no Admiralty coroner, “the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land.” Suppose that, on the present occasion, had been in Rochester, where the city coroner clearly had jurisdiction, but the body, afterwards, had been removed into the county: if the city coroner could not take the view in the county, he could hold no inquest. It would be an indecorum to carry the body from place to place merely for this purpose. [PATTESON, J. Then, if the body was brought into the city at first, it should be kept there.] It might have been removed to the hospital out of the city limits with a hope  
 \*949] of \*resuscitation. [PATTESON, J. Then it must be brought back, if the inquisition is to be taken in the city.]

*Iervis* was not heard in support of the rule.(b)

*per Curiam*.(c)

Rule absolute.

(a) 2 Hale's P. C. 68.

(b) During the argument he cited *Rex v. Ferrand*, 3 B. & Ald. 260.

(c) Lord Denman, C. J., Patteson, Williams and Coleridge, Ja.

## LUCAS and Others, Executors of JAMES ROSE, v. JONES.

Defendant, in support of a plea that he had paid five quarters' rent to M., tendered in evidence the following paper, signed by M. "Mr. Jones" (defendant) "having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent till the 24th day of July, 1841." M. had delivered the paper to defendant, being then indebted to him on a mortgage debt exceeding 72*l.* The only stamp on the paper was a 1*l.* stamp, with no denomination on its face, and had been affixed more than one month after the signing and delivery of the paper.

*Held*: 1. That the instrument was a receipt under stat. 55 G. 3, c. 184, Schedule, Part I., Receipt.

2. That it was inadmissible, for want of a proper stamp, though a receipt stamp would have cost less than 1*l.*; sect. 10 of stat. 55 G. 3, c. 184, not protecting receipts which have not been stamped within a month after execution, under stat. 35 G. 3, c. 55, ss. 8, 10, 11.

**COVENANT.** The declaration set out a lease and release, by W. Brown and J. S. Fisher, of certain tenements whereof they were seised in fee, (and afterwards mentioned to have been demised to the defendant,) to Thomas Weatherley Marriott in fee, habendum to him in fee, to such uses as he should appoint by deed, &c.: averment that Marriott became seised, and, being so seised, to wit, on 1st June, 1831, by indenture then made between himself of the one part and defendant of the other, demised to defendant, his executors, &c., a piece of land with the messuage thereon, habendum to defendant, his executors, &c., for twenty-one years \*from 25th [\*950 of March then last, at the yearly rent of 57*l.* 15*s.*, payable quarterly at Midsummer, Michaelmas, Christmas and Lady Day; that defendant thereby covenanted with Marriott, his heirs and assigns, that defendant, his executors, &c., would during the term pay Marriott, his heirs, &c., the rent reserved on the days when it was made payable; by virtue of which demise defendant entered, &c.; that afterwards, to wit, 23d May, 1832, Marriott, being seised of the reversion, by indenture of appointment, appointed the demised premises to J. H. Mair and the testator Rose, in fee; by virtue of which, &c., Mair and Rose became seised in fee of the reversion: that afterwards, to wit 5th April, 1836, Mair died, leaving testator Rose surviving; who continued seised in fee until his death: that, during his life, a large, &c., to wit, 80*l.*, for five quarters, became due by defendant to Rose, and still, &c.

**Plea 1.** Payment by defendant to, and acceptance by, Marriott, of a large sum, to wit, &c., in satisfaction and discharge of the sum claimed: averment that, at the time of the payment, defendant had no knowledge or notice of the transfer to J. H. Mair and J. Rose of the reversion, or of any title, interest or authority of Mair and Rose of, in or to the said reversion, or of, in or to the moneys so paid by defendant to Marriott, or of any part thereof: and so defendant in fact saith that no part of the said 80*l.* in the declaration mentioned ever became or was due or owing by defendant to Rose, in manner and form, &c.: verification.

**Replication.** That defendant did not pay to Marriott, nor Marriott accept

or receive, the moneys in the plea mentioned, in satisfaction and discharge,  
 \*951] &c., in \*manner and form, &c.: conclusion to the country. Issue thereon.

Other issues in fact were joined.

On the trial, before PATTESON, J., at the Middlesex sittings in Michaelmas term, 1843, the defendant proved that, in July, 1841, Marriott being indebted to the defendant in a debt secured by mortgage, exceeding the amount of the five quarters' rent due, it was agreed between the two that the said amount should be deducted from the mortgage debt; which deduction was to operate as a satisfaction for the rent; and it appeared that a written paper, signed by Marriott, was then handed to the defendant. The paper was tendered in evidence by the defendant, and was as follows:

“Mr. Jones having written off the sum of 72*l.* 3*s.* 9*d.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th day of July, 1841.”

This was stamped with a 1*l.* stamp, which had no denomination, and, by an endorsement of the stamp commissioners, it appeared that the stamp had been affixed, on payment of a penalty, more than a month after the date of the instrument. The counsel for the plaintiffs contended that the instrument was inadmissible for want of a receipt stamp. The learned judge received the evidence. Verdict for defendant on the issue on the replication to the first plea, and for plaintiffs on the other issues.

In Michaelmas term, 1843, *Jervis*, for the defendant, obtained a rule nisi for a new trial.

*Platt* and *Barstow* now showed cause. First, the instrument was not a  
 \*952] receipt. The language of stat. 55 \*G. 3, c. 184, Schedule, Part I., tit. *Receipt*, is “Receipt or discharge, given for or upon the payment of money.” Here no money is paid: but Marriott agrees to set one debt off against another. A receipt would not properly represent such a transaction. Again, if this can be construed as a receipt, it falls within the exemption, “Receipts or discharges endorsed or otherwise written upon, or contained in any bond, mortgage, or other security, or any conveyance, deed or instrument whatever, duly stamped according to the laws in force at the date thereof, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest or annuity thereby secured.” Here the agreement has a stamp, sufficient for an agreement: and the receipt, if it can be called one, is for the consideration therein expressed.

Further, section 10 protects the instrument. The amount is 20*s.*, a larger sum than the highest receipt stamp: and the stamp is not appropriated.

*Jervis*, contra. The attempt is to treat this instrument as a receipt for the purpose of the plea, and as an agreement for the purpose of the stamp. If it be a receipt, the stamp is wrong; if an agreement, the plea of payment is not proved. The parties agree to treat the writing off of the debt as money:

and therefore the evidence offered is of a receipt for the payment of money.<sup>(a)</sup> Reliance is placed on the definition of *Receipt*, in Sched. Part I. to stat. 55 G. 3, c. 184: but, under the same head, it is said, “And any note, memorandum or writing whatsoever, given to any person for \*or upon [ \*953 the payment of money, whereby any sum of money, debt or demand, or any part of any debt or demand therein specified, and amounting to 2l. or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money, of equal amount with the sum, debt or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly.” That exactly describes this instrument, according to the effect which the defendant seeks to give it.

Stat. 55 G. 3, c. 184, s. 10, does not apply; for a receipt, by sects. 8, 10, and 11 of stat. 35 G. 3, c. 55, must be stamped, either before it is executed, or within a month from that time.

LORD DENMAN, C. J. As between Marriott and the defendant, this writing off of the debt was, by the agreement, to be considered money. This, therefore, is a receipt or discharge given on the payment of money.

PATTESON, J. An instrument which only admitted a settlement on a by-gone day, might operate merely as an admission. But this is a receipt for a payment made at the time. Sect. 10 of 55 G. 3, c. 184, will not protect this stamp. That section gives effect to a stamp which is not less in amount than the proper stamp, provided it be not specially appropriated to any other \*instrument, by having its name on the face thereof. That defence [ \*954 might have arisen if the 1l. stamp had been affixed before the receipt was executed. But here the stamp has been improperly affixed, since, by stat. 35 G. 3, c. 55, ss. 8, 10, the stamp must be on the paper before it is used as a receipt, though, by sect. 11, on payment of certain penalties the instrument may afterwards be stamped. But that must be done within a month; and here it was not.

WILLIAMS and WIGHTMAN, Js., concurred.

Rule absolute.

(a) 8 *Hart v. Nash*, 2 C., M. & R. 337; 5 C. 5 Tyrwh. 955; *Hooper v. Stephens*, 4 A. & E. 71.

**\*955]      \*Ex parte The Duke of MARLBOROUGH.**

The court will not grant a criminal information for unwritten words imputing to a justice malversation in his office, if the words neither were spoken at the time when the justice was acting, nor tended to a breach of the peace.

SIR *F. Thesiger*, solicitor-general, moved, on behalf of the Duke of Marlborough, for a criminal information against L. C. Humfrey, Esq., for using certain language alleged to be injurious to the duke. From the affidavits on which the motion was founded, it appeared that the duke was an acting justice of the peace for Oxfordshire: that, in last April, a vacancy having occurred in the representation in parliament of the borough of Woodstock in that county, the Marquis of Blandford, eldest son of the duke, and Mr. Humfrey were respectively proposed and seconded as candidates: and that Mr. Humfrey, on that occasion, addressed a large body of the electors and inhabitants of Woodstock, and in this address used the words now complained of. The affidavit set out the words from notes taken at the time. The following extracts contain the portions material to the decision of the court. "Harris was a respectable man, but not rich: he held a cottage under the duke, and kept a horse. One day he took this horse to water at a pit to which he certainly had no legal right to go; and Timothy Slingo, the duke's hayward, passing by, took up the horse to put it into the pound. Harris touched the horse with his whip; and it broke from the hayward's custody, and naturally enough ran back to his own stable. Harris was summoned for rescuing the horse, and committing breach of pound: he was fined 1s., and the costs, which amounted to the sum of 19s. 6d. This

**\*956]** was more than he could pay; and he went to jail. \*When he was in jail, his creditors came upon him; his property was seized and sold under an execution; he became a ruined man; and he is now at work upon the roads." "Two magistrates, before whom he was first brought, refused to convict him, because they considered that the hayward had somewhat exceeded his duty. He was then brought before the duke, a fit judge in his own cause: and, sitting on his own dog kennel with a glass of ale in his hand, the Duke of Marlborough himself convicted Harris, and sent him to jail." The speech, as set out in the affidavits, contained also a charge against the duke as to a dispute respecting an item in the bill for the funeral of his late father, a charge imputing unkind conduct towards an invalid taking exercise in the duke's park, and a charge imputing harshness on the part of the duke towards his tenantry. The speech also, by the affidavits, appeared to contain other imputations, upon which however the solicitor-general did not rely. All the charges were denied upon affidavit.

LORD DENMAN, C. J. This is an application which calls upon the court to interfere by the exercise of its extraordinary jurisdiction. The words complained of certainly do impute a most grievous charge; and I do not wonder that the Duke of Marlborough has come into court to deny the truth of that charge upon oath. That is a benefit which the subject enjoys by

means of the opportunity afforded him upon discussing the propriety of granting or refusing this remedy. The question now is, whether these words are of such a nature as to entitle the Duke of Marlborough to the remedy. With respect to the last three charges, it is clear, upon \*all the [957] authorities, that words merely spoken are not the subject of a criminal information. The exception is in those cases where the words amount to a provocation to break the peace, by their inciting either to personal violence or to a challenge. We have, however, felt some doubt as to that charge which imputes corruption in the character of a magistrate. As to this, the denial on the part of the duke is conclusive. But we find no precedent for granting a criminal information in such a case. It has often been said that the court will not interfere, except where the words are uttered at the time when the magistrate is performing his duty: and the reason of that exception is, that there a direct obstruction is created to the course of justice. The magistrate in such a case may treat the words as a contempt; but in my opinion it is then far more expedient that this court should interpose. There is no case that directly decides that this court will interfere in the case of a charge orally made against a magistrate in that character. Mr. Starkie in his treatise on the Law of Slander and Libel,<sup>(a)</sup> published in 1830, after stating that abusive and defamatory words spoken of justices of the peace in their absence, which do not relate to the execution of their office, are not indictable, adds: "But the case might fall under a very different consideration if a magistrate were to be charged with some specific act of oppression or corruption in his judicial capacity." That, however, is no more than an opinion doubtfully expressed, and does not appear to be founded on any authority. I expected that the solicitor-general would comment upon the cases in \*which interference under these circum- [958] stances has been refused, and would refer us to some authority upon which we could now act as he requires. That has not been done; and the only reason is, that no such authority exists even as a dictum or opinion. It is perfectly clear that we could not grant this information without creating a precedent; and this we ought not to do where a known course has been proceeded in for many years, unless we felt perfectly clear that the law would warrant us in so doing. And there is another principle, independent of this, which makes us unwilling to treat mere words as affording ground for a criminal information. Words may be so differently understood, and the circumstances under which they are uttered may supply so many opportunities of explanation, that we must feel most reluctant to act on what must depend so much upon oral evidence. We therefore ought not to depart from the established principles: such a departure might lead to a long inquiry conducted in the most inconvenient way.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred. Rule refused. (b)

(a) Vol. II. pp. 199, 200, (second edition.)

(b) See *Regina v. Langley*, 2 Salk. 697; *Regina v. Wrightson*, 2 Salk. 698; *Rex v. Revel*, 1 Str. 420; *Rex v. Porock*, 2 Str. 1157; *Rex v. Welje*, 2 Campb. 142; *Ex parte Chapman*, 4 A. & E. 773; *Rex v. Eurn*, 7 A. & E. 190.

\*959]

## \*The QUEEN v. DUNN and BENNETT.

When the order of a town council, being brought up by certiorari, is quashed, on motion, with costs, the court should decide who is to be charged with costs as prosecutor of the order, and the party should be named in the rule.

Therefore, where orders for payment of money out of borough funds were so brought up (under stat. 7 W. 4, & 1 Vict. c. 78, s. 44) and quashed with costs *to be paid by the prosecutors*, the rule not further stating by whom the costs were to be paid, and no cause having been shown, the court refused to grant an attachment against individuals, A., B. and C., for non-payment, though the rule for an attachment was drawn up on reading affidavits of A., B. and C., used in opposing the motion for a certiorari, and which showed, as the parties applying for an attachment contended, that A., B., and C. were the persons who prosecuted the orders since quashed, by supporting them in this court.

THE rule for a certiorari in the case of *Regina v. The Council of Lichfield*, 4 Q. B. 893, having been made absolute, and the writ issued and obeyed, a rule was obtained calling upon "the prosecutors(a) to show cause" why the orders brought up under the writ should not "be quashed or disallowed, with costs." The rule was drawn up on reading the affidavits in support of the motion for a certiorari. No cause was shown: and in last Michaelmas term the rule was made absolute for quashing the orders, "with costs to be paid by the prosecutors to the defendants or their attorney."

In last Hilary term, a rule was obtained calling upon Thomas Rowley, Halford Walton, Hewitt, Stephen Brassington, Richard March Kidger, Samuel Spofforth, John Heap, Robert Sharp, Thomas Whitaker, Frederick Bond, Charles Simpson, George Birch, Joseph Webb, John Rutledge  
\*960] Majendie, and Richard Croft Chawner, to show \*cause why attachments should not issue against them for their contempt in not paying 67*l.* 2*s.* 4*d.*, taxed costs, pursuant to the rule of Michaelmas term.

The rule nisi for an attachment was drawn up on reading an affidavit by Alfred Egginton as "attorney for the above-named defendants," (Dunn and Bennett,) which stated that the rule made in Michaelmas term had been served on the parties now called upon to show cause (styled in this affidavit "the prosecutors"); and payment demanded of them, but not made. Also upon reading affidavits(b) sworn by the last mentioned parties (among others) in opposition to the rule for a certiorari in *Regina v. The Council of Lichfield*, 4 Q. B. 893.

In opposition to the present rule, Simpson deposed that he never was one of the council, but only the town clerk, and solicitor to the corporation; that the council, at a quarterly meeting, resolved that Simpson, as such town clerk and solicitor, should take the necessary proceedings for showing cause

(a) By the practice of the Crown Office, when orders are brought up by certiorari, the parties seeking to enforce the orders are considered as prosecutors, and the parties against whom they will be enforced if the motion fails (and at whose instance the certiorari issued) as defendants; and the rules are entitled accordingly. See, as to orders of sessions, the advertisement prefixed to Burr. Sett. Ca.

In the present case, Dunn and Bennett appeared, by endorsement on the certiorari, to be persons interested in the borough rate, at whose instance the writ issued.

(b) For the substance of these, see 4 Q. B. 897—900.

against the rule for a certiorari, and the common seal was affixed to a copy of the resolution, in pursuance of which Simpson prepared affidavits, and instructed counsel, on behalf of the town council in their official capacity, and not of himself or of any individual personally. Rowley, Brassington, Spofforth, Heap, Sharp, Bond, and Webb, also made affidavit, deposing, each for himself, that he never acted in the making of the orders removed except officially as a member of the council, and never instructed counsel against the rule otherwise than officially and on the council's behalf, and never was a prosecutor of the said orders or rules except in his capacity of a councillor: \*and that, if compelled personally to pay the costs, [\*961 he knew of no means whereby he could recover them from the corporation or council, unless this court should order the council in their official capacity to pay them out of the borough fund. Hewitt deposed that, since making his former affidavits, and before the rule of Michaelmas term was obtained, he ceased to be a councillor, and that he had not since acted as one; and that, except in his official capacity as a councillor, he had not acted as prosecutor of the certiorari, or shown cause against the original or subsequent rules granted by the court. Majendie and Chawner deposed that they were not, and never had been, burgesses of the city; and they, together with Kidger, Whitaker and Birch, further stated that they were not, at the time of the making of the orders since quashed, nor had since been, members of the council, and that they had not acted as prosecutors of the writ of certiorari, nor appeared by counsel or otherwise to show cause against the original or subsequent rules granted by this court. Birch (an attorney) stated that he was appointed treasurer of the city after the removed orders were made, and remained in office till 12th December, 1843; that he did not act as attorney for the prosecutors or the defendants in this matter; that his affidavit on showing cause against the rule for a certiorari was made in the capacity of treasurer, at the request of the town clerk acting as attorney for the council; and that he considered himself bound, while treasurer, to speak as to the state of the accounts relating to the borough fund, when called upon by the council, or the town clerk on their behalf. And that, when the orders since quashed were made, he was not a burgess. The \*affidavits also averred the belief of the de- [\*962 ponents that Eggington knew the principal facts deposed to, when he made his affidavit in support of the present rule nisi.

*Erle* and *W. R. Cole*, for eight of the parties, and *Sir F. Thesiger*, solicitor-general, for the other six, now showed cause. This was an application made under stat. 7 W. 4, & 1 Vict. c. 78, s. 44. The applicants have no right to treat the individuals who opposed the rule for a certiorari as the prosecutors. The party really contesting the rule was the corporation, in its corporate capacity. The orders complained of were the acts of the town council for the time being; it was for the council, not individuals, to defend those acts; and they showed their intention to do so, by the resolution which they passed under their common seal. The "prosecutors" mentioned in

the rule of the last term must be the parties who really showed cause. [PATTESON, J. The party making the rule absolute meant simply "the other side."] Those parties, at least, could not be "prosecutors," for the purpose of this rule, who were not members of the council. There is no precedent for making a person pay costs merely because he has joined in affidavit against a rule. It is suggested that if the parties obtaining the certiorari have not this remedy they must themselves pay the costs incurred on their side: but that cannot be remedied; stat. 7 W. 4, & 1 Vict. c. 78, s. 44, gives only a limited jurisdiction where an order of the council has been made improperly for the payment of money. The court (as appeared to be the case in *Regina v. The Mayor, &c. of Bridgewater*, 10 A. & E. 281, and \*963] *Regina v. Paramore*, 10 A. & E. 286, cannot \*enforce the restitution of the money; nor can they compel individuals to pay the costs, where it is clear that the council, and not any individual, was the party interested in upholding the orders. [PATTESON, J. The result of the argument seems to be that, where a person interested in the borough fund obtains a certiorari to remove orders by which it has been misapplied, the money cannot be recovered back, and the borough fund must be saddled with the costs.] If the town council have improperly incurred costs, that may be a misapplication for which they, as a body, may be liable. [PATTESON, J. The town council is not a corporation.](a)

*F. V. Lee*, contra. The statute, sect. 44, does not expressly provide for payment of costs by any person; but leaves them in the "judgment and discretion" of the court. The costs here may be safely awarded according to the view which the parties prosecuting the orders have taken of their own case, as appears by their affidavits. According to the argument on their part, the persons who had illegally appropriated the public money would be irresponsible. The court has in several instances ordered costs to be paid by the person who appeared on the affidavits to be liable. [Lord DENMAN, C. J. No doubt it is done. The court exercises its judgment on the particular case; the costs being made the subject of a separate motion. We laid down the practice in *Regina v. Greene*, 4 Q. B. 646.] The council is not a corporation; the members, therefore, are liable in their individual \*964] capacities. If not, there is no person \*from whom the costs of quashing these illegal orders can be recovered.

Lord DENMAN, C. J. I regret that, when the motion to quash with costs was made, our attention was not called to the peculiar practice on the removal of orders by certiorari; we might then have avoided the difficulty which has arisen. The course always adopted in such cases, where the character of the person appearing in the situation of a prosecutor was not expressly defined, has been that the court should decide who should be deemed the prosecutor; not that the individual succeeding should call upon whom he pleased as liable in that capacity. An oversight has been committed; but we cannot remedy it by enforcing a demand of costs merely

(a) See *Regina v. York*, 2 Q. B. 847, 850.

because the party claiming them has called upon some individuals as prosecutors.

PATTESON, J. I am of the same opinion. Our attention should have been called to the point of practice at the time of the motion. The subject is a difficult one. We do not properly know for whom Mr. *Erle* and Mr. *Cole* appeared. Had the question been brought before us, we should have exercised our judgment upon it at the time; and it would have been matter for a great deal of consideration whom we should direct to pay. At present we do not know who are the prosecutors, but are only informed that the successful party has selected some persons as those who ought to pay the costs.

WILLIAMS, J. The court has to exercise a discretion in these cases. Where a rule is successfully maintained, \*the party resisting is generally the one liable to costs. But here it does not appear who that party was. There may be a great difficulty in determining; but, that we might get over it, some person ought to have been demonstrated as the party against whom the claim was directed. [\*965

WIGHTMAN, J., concurred.

Rule discharged.

### HERBERT v. SAYER.

Under stat. 6 G. 4, c. 16, ss. 63, 127, and stat. 1 & 2 W. 4, c. 56, s. 25, an uncertificated bankrupt may acquire property, and contract, for the benefit of his assignees, and may sue in respect of such property or contract. And a plea showing the bankruptcy, &c., constitutes no defence, unless there be an allegation that the assignees have interfered. The same is true in the case of a party who has twice been bankrupt and obtained his certificate, but has not paid fifteen shillings in the pound, in respect of property acquired since the certificate. *Held*, by the Court of Exchequer Chamber, reversing the judgment of the Court of Q. B.

By the Court of Q. B.: De injuriâ may be replied, in an action by the endorsee of a bill of exchange against the acceptor, to a plea that the bill was accepted for the accommodation of the drawer, to be deposited with R. as a collateral security for a debt from the drawer to R.; that R. took it on those terms; that the drawer, before maturity, paid R. part of such debt, and tendered the residue, which R. refused to accept; and that R. afterwards endorsed the bill to plaintiff, in order that the plaintiff, conspiring and colluding with R. to defraud defendant, might recover as a trustee for R.; such plea being in excuse and not in discharge.

Assumpsit on a bill of exchange, drawn by Thomas Spence, 9th June, 1842, on defendant, for 30*l.*, at three months, accepted by defendant, endorsed by T. Spence to Thomas Rogers, and by T. Rogers to plaintiff.

Plea 4. That defendant accepted the bill at the request of Spence, and without ever having received any consideration or value whatever for his acceptance, and for the accommodation of Spence, and in order that he might deposit the same with Rogers as a collateral security as after mentioned, and for no other purpose whatever: that, after defendant had so accepted, to \*wit, 9th June, 1842, Spence endorsed and delivered the bill to Rogers, and Rogers then took and received the same, as a collateral security for the payment of the sum of 25*l.* then due to Rogers as the balance of a certain other bill of exchange for 50*l.* then in his pos- [\*966

sion, and of which he was the endorsee and holder, to wit, a bill drawn by Spence upon and accepted by one Matthew Foster, at three months, payable to Spence's order, and which bill Spence endorsed to one George Baker, who endorsed the same to Rogers; the residue of the last-mentioned bill, to wit, 25*l.*, having been paid to Rogers by the said Spence before the endorsement to Rogers of the bill in the declaration mentioned: and that the bill in the declaration mentioned was delivered to and received by Rogers for such purpose as in this plea mentioned, and no other purpose, or consideration, or value whatsoever. That, after Rogers had taken and received the bill in the declaration mentioned, and whilst the same was in his custody and possession, and before the same had become due or payable, to wit, 9th July, 1842, Spence paid to Rogers, who then accepted and received the same, a certain sum of money, to wit, 15*l.*, in part payment of the said balance of 25*l.* then remaining due and payable to Rogers on the bill for 50*l.*; and then there remained due, in respect of the last-mentioned bill, a certain small sum of money, to wit, 10*l.*, and no more. That afterwards, and whilst the bill in the declaration mentioned was in the custody and possession of Rogers for such purpose as aforesaid, and before the same had become due or payable, to wit, 1st September, 1842, Spence tendered and offered to Rogers a certain sum of money, as and being the balance \*967] then \*remaining due on or in respect of the bill for 50*l.*, and also for or in respect of any interest or damages which might have accrued, or could be claimed by Rogers, on or in respect of the last-mentioned bill; to wit, 11*l.*; which last mentioned sum was the full amount to which Rogers was at the time of the said tender entitled upon or in respect of the bill for 50*l.*, to secure the payment of which the bill in the declaration mentioned was deposited with Rogers, as in this plea aforesaid; and which tender and offer of Spence, Rogers then wholly refused to accept or receive, and then wrongfully kept and detained the bill in the declaration mentioned, and wholly refused to deliver up the same either to Spence, or defendant, or any other person, although he was then, to wit, on, &c., requested by Spence and defendant so to do. That, after the tender had been so made to and refused by Rogers, and after Rogers had so wrongfully refused to deliver up the bill, to wit, &c., Rogers endorsed the bill in the declaration mentioned to plaintiff, and plaintiff then took and received the bill in the declaration mentioned with full knowledge and notice of the premises. Verification.

(This plea led to an issue of fact, but is here set out for the purpose of rendering the sixth plea intelligible.)

Plea 6. That defendant accepted the bill in the declaration mentioned for the accommodation of Spence, and without ever having received any consideration or value for the acceptance thereof, and for the purpose, and in the manner and form, as in his fourth plea above alleged: that Spence de-  
 \*968] posited the bill \*with Rogers, who received the same, for the purpose and in the manner in the fourth plea in that behalf alleged

and for no other purpose, consideration, or value whatever. That Spence paid to Rogers the sum of money in the fourth plea in that behalf mentioned, to wit, 15*l.*, in part payment of the said balance of 25*l.*, in manner and form as, and at the time, in the fourth plea alleged. That Spence tendered and offered to Rogers the said sum of money in the fourth plea in that behalf mentioned, being the balance remaining due to him upon and in respect of the bill for 50*l.* in the fourth plea mentioned, at the time therein mentioned, which said sum Rogers then wholly refused to accept, as in the fourth plea mentioned, and then refused to deliver up and wrongfully detained the bill in the declaration mentioned, in manner and form as in the fourth plea above in that behalf alleged. That, after the said tender to and refusal by Rogers, and after his said refusal to deliver up the bill in the declaration mentioned, in the said fourth plea alleged, to wit, on, &c., Rogers endorsed the bill in the declaration mentioned to plaintiff, with the intent and in order to cheat and defraud defendant of the amount thereof by plaintiff's suing defendant upon the same as a mere trustee for Rogers, and forcing and compelling defendant to pay the bill, without the plaintiff's having any beneficial interest in the same; and plaintiff then took, had, and received the bill in the declaration mentioned, with the same intent and purpose; and he and Rogers then conspired and colluded together to cheat and defraud defendant of the amount of the bill in the declaration mentioned, by the means aforesaid. Verification.

[\*969]

\*Replication: De injuriâ.

Special demurrer, assigning for cause that the matters of defence do not merely amount to an excuse, but show that defendant never was liable to perform his promise, and never was liable to pay plaintiff; and that therefore the replication De injuriâ is inappropriate: and that the replication is multifarious.

Joinder in demurrer.

Plea 7. That, before and on March 1st, 1830, and thence to the suing out of the commission of bankrupt after mentioned, plaintiff was a trader, subject to the statutes then in force concerning bankrupts, &c. The plea then averred a petitioning creditor's debt, and proceedings in bankruptcy, the commission being dated 10th March, 1830; and a certificate, dated 14th May, 1830. That afterwards, and after the passing of a certain act, &c., (Bankruptcy Court Act, 1 & 2 W. 4, c. 56,) and before the accruing of the causes of action, and thence until the issuing of the fiat after mentioned, plaintiff as a trader, &c. The plea then averred proceedings in bankruptcy, the fiat being dated 20th August, 1839; an appointment of the official assignee, David Cannan, dated 21st August, 1839; appointment of the creditors' assignee, John Pare the younger, dated 30th August, 1839, and acceptance by the latter; also a certificate, dated 21st November, 1839: that the estate of plaintiff, under the said fiat, did not produce, nor has as yet produced, sufficient to pay every creditor under the said fiat 15*s.* in the pound on the amount of their respective debts proved under the said fiat;

and none of the said creditors has as yet received 15s. in the pound on the amount of \*their said debts. That the bill of exchange in the declaration mentioned was endorsed to plaintiff, and the cause and causes of action thereon accrued to him, after the said signing and allowing of the said last-mentioned certificate: whereby, and by force of the statute in such case, &c., the cause of action in the declaration mentioned, and the sum of money therein claimed and demanded, is vested in the said John Pare the younger and David Cannan as such assignees under the said fiat, according to the form of the statute in that case, &c. Verification.

Special demurrer, assigning for cause that, although the bill of exchange distinctly appears to be after-acquired property, that is to say endorsed to plaintiff, and the cause and causes of action therein accrued to him after the alleged signing and allowance of the last mentioned certificate, yet it does not appear that John Pare the younger and David Cannan, or either of them, hath ever interfered with plaintiff in, about, or in respect of the cause or causes of action thereon, nor that they have brought any action upon the bill, or taken any legal or other proceedings for the recovery of the amount thereof, or any part thereof; but it is consistent with the allegation in the plea that plaintiff may sue for the same, either in his own right, for his own benefit, or as trustee for the assignees under the fiat.

Joinder in demurrer.

The demurrer was argued in the Court of Queen's Bench, in Easter term, 1843,(a) by *G. Atkinson* for the plaintiff and *Willes* for the defendant. It is \*971] \*considered sufficient to refer, for the argument, to the judgment and notes.

*Cur. adv. vult.*

Lord DENMAN, C. J., in the vacation after Easter term, 1843, (May 17th,) delivered the judgment of the court.

The replication to the sixth plea in this case being *De injuriâ*, the question is raised whether that plea discloses matter in excuse, or in discharge.

In the case of *Salter v. Purchell*, (b) the same question was raised, but under circumstances so unlike the present that the case affords no guide to us. The case of *Humphreys v. O'Connell*, 7 M. & W. 370, is more like the present, where the plea was held to be in excuse. But the case of *Mitchell v. Cragg*, 10 M. & W. 367, still more resembles the present: and there also the plea was considered to be in excuse. PARKE, B., there says, the breach is, that the defendant did not pay the plaintiff; the plea in truth says, "I admit I never did pay the plaintiff, because he was the holder of the bill under such circumstances that he was not entitled to be paid:" it is like the case of *Isaac v. Farrar*, 1 M. & W. 65. (c)

(a) May 2d. Before Lord Denman, C. J., Patteson and Williams, Js.

(b) 1 Q. B. 209, in Exch. Ch., reversing the judgment of Q. B., in *Purchell v. Salter*, 1 Q. B. 197.

(c) 8 C. Tyrwh. & Gr. 281. Reference was made also to *Schild v. Kilpin*, 8 M. & W. 673; *Scott v. Chappelow*, 4 M. & Gr. 336; *Parker v. Riley*, 3 M. & W. 230; *Marston v. Allen*, 8 M. & W. 494.

In the present case the plea shows nothing illegal in the bill originally: it shows that the defendant accepted it for the accommodation of the drawer, Spence, to enable him to deposit it with one Rogers as a collateral \*se- [\*972  
curity for a debt due to Rogers from Spence; that Rogers took it on those terms; that Spence, *before the bill became due*, paid Rogers part of that debt and tendered the residue; that Rogers refused to receive the money tendered, kept the bill, and endorsed it to the plaintiff as a mere trustee, Rogers and the plaintiff conspiring and colluding to cheat the defendant.

These averments are said to show illegality in regard to the bill; but, in truth, they amount to little more than a statement that the plaintiff took the bill with knowledge of the circumstances, and without giving any consideration for it. The matter, therefore, stands thus: that the bill was originally given to Rogers, but not to be enforced under certain circumstances; that those circumstances occurred before the bill became due; and that Rogers, knowing he could not enforce the bill, endorsed it to the plaintiff that he might attempt to do so, for his, Rogers's benefit. If Rogers had been the plaintiff, the direct transaction with him might perhaps have been matter of discharge: but, as the plaintiff is a stranger to the defendant, and *prima facie* there is a promise in law by the defendant to pay the plaintiff, arising out of the endorsement of the bill, the plea, which discloses transactions with the former holder, Rogers, and the circumstances under which the plaintiff took the bill from him, amounts only to an excuse for not performing to the plaintiff that *prima facie* promise: and the replication *De injuriâ* is good.

The seventh plea in this case states that the plaintiff has been bankrupt twice, and obtained his certificate each time, but that his estate under the second bankruptcy has not paid fifteen shillings in the pound, and [\*973  
\*that the bill was endorsed to him after his second certificate. To this there is a special demurrer, assigning for cause that it does not appear that the plaintiff's assignee had interfered, and that it is consistent with the plea that the plaintiff may be suing either in his own right or for the benefit of the assignee. It is contended for the plaintiff that he has a right to sue unless his assignee interferes, and that the allegation of such interference should be made by the defendant in order to defeat the action. The defendant, on the other hand, contends that the law passes the interest in the bill to the assignee, who can sue on it in his own name, and that the plaintiff is bound to show that the assignee has relinquished his right to do so.

The case of *Young v. Rishworth*, 8 A. & E. 470, is a direct authority in favour of this plea. The effect of that decision is said by PARKE, B., in *Fyson v. Chambers*, 9 M. & W. 460, 467, to be that the plea is *prima facie* an answer to the action, and that the facts of the plaintiff being a mere trustee, or having the assent of his assignee, ought to be replied: and the case of *Fyson v. Chambers*, 9 M. & W. 460, which decides that a mere wrongdoer cannot in trover set up the title of the assignees, was distin-

guished by the court. Whether it be in truth distinguishable, or be contrary to *Young v. Rishworth*, we will not now elaborately discuss: it is sufficient to say that we are satisfied with the decision in *Young v. Rishworth*, 8 A. & E. 470, and that it is so directly in point that we think the defendant entitled to our judgment upon this plea. (a)

\*974] \*The result is, that the judgment will be for the plaintiff on the replication to the sixth plea, and for the defendant on the seventh plea.

Judgment for plaintiff on replication to sixth plea. For defendant on seventh plea. (b)

The plaintiff brought error upon this judgment: and the case was argued in the Exchequer Chamber, in the vacation after Michaelmas term, 1843, (c) by *Erle*, for the plaintiff in error, (the plaintiff below,) and *Byles*, Serjt., for the defendant in error. It is considered sufficient to refer, for the argument, to the judgment and notes. *Cur. adv. vult.*

TINDAL, C. J., in this term, (April 26th,) delivered the judgment of the court.

The question in this case arises upon a demurrer to the defendant's last plea, on which the Court of Queen's Bench gave judgment in favour of the defendant: and on that judgment a writ of error has been brought.

The action was at the suit of the endorsee of a bill of exchange against the acceptor; and the plea was, in substance, that, before the endorsement, the plaintiff had twice become a bankrupt, that a commission issued against him, under which he had obtained his certificate, and afterwards a fiat, under \*975] which also he had obtained \*his certificate; but that his estate, under the fiat, had not been sufficient to pay each creditor fifteen shillings in the pound: that the bill of exchange was endorsed to the plaintiff after the allowance of the last certificate, whereby the cause of action on the bill was vested in the assignees under the fiat.

To this plea there was a demurrer assigning special causes, including the main objection, which however would arise on general demurrer: and that objection is, that the plea is bad because it does not state that the assignees under the fiat, or either of them, had interfered, or required the defendant to pay them the amount of the bill.

The point to be considered and decided is of great importance: it relates to the right of a bankrupt twice certificated, and who has not paid fifteen shillings in the pound, to after-acquired property, such as the bill for which he sues. And the question is, whether he has a good right to such property

(a) On this last point, reference was made in argument to some decisions on reputed ownership, under stat. 6 G. 4, c. 16, s. 72. See *Butler v. Hobson*, 4 New Ca. 290; *Same v. Same*, 5 New Ca. 128.

(b) Besides the cases mentioned in the judgment, reference was made to *Ex parte Welsh*, Mont. Ca. B. 276; *Ashby v. Kennard*, note (n) to Smith's Mercantile Law, 362. (3d ed.), *Ex parte Jungmichel*, 2 Mont. D. & De G. 471; *Ex parte Butler*, 2 Mont. D. & De G. 731; *Ex parte Robinson*, Mont. & Mac. 44.

(c) November 28th. Before Tindal, C. J., Coltman, Erskine, and Maule Js., and Parkes, Alderson, Gurney, and Rolfe, B.

against the parties to the bill, and all the world except the assignees, or no right whatever, so that he could not sue at all upon the bill.

We are of opinion that he has a good right, except as against the assignees; and, as the plea does not state that they have interfered, it does not contain a complete defence. And to this conclusion we have come, as well upon the authorities, as upon the reason and convenience of the principle which they establish.

In the first place, a bankrupt in this condition is, we think, in the same situation with respect to property acquired after a second certificate as an uncertificated bankrupt was with respect to property acquired after the assignment before the recent statutes.

By stat. 6 G. 4, c. 16, s. 127, which provides for the \*after-ac- [976  
quired property of a bankrupt twice certificated, it is enacted that the future estate and effects of the bankrupt (except tools, &c.) shall vest in the assignees under the commission, "who shall be entitled to *seize the same in like manner* as they might have seized property of which such bankrupt was possessed at the issuing the commission." Such effects, by the former statute, 5 G. 2, c. 30, s. 9, were only liable to the execution of a creditor. The effect of this section is to put such future property on the same footing as future property under the assignment. The operation of the assignment is by stat. 6 G. 4, c. 16, s. 63, which provides that the commissioners are to assign to the assignees all present and *future* personal estate of such bankrupt, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, *before he shall have obtained his certificate*, and all debts due or to be due to him, as fully as if the assurance, whereby they are secured, had been made to such assignees: and after such assignment neither the bankrupt nor any person claiming through or under him shall have power to recover the same; but the assignees shall have like remedy to recover the same that the bankrupt might have had if he had not been adjudged bankrupt. By stat. 1 & 2 W. 4, c. 56, s. 25, the estate becomes vested to the same extent in the assignees by virtue of their appointment, without any deed of assignment.

By the operation of these statutes, the future property of the bankrupt, after a second certificate, becomes vested in the assignees by the mere appointment, \*in the same way as future property, acquired after the assign- [977  
ment and before a certificate. But, under the prior statutes, and by virtue of the construction put upon them by the courts, the assignment in like manner vested property acquired before the certificate in the assignees.

Under stat. 34 & 35 H. 8, c. 4, s. 1, the Lord Chancellor, &c., might order the bankrupt's goods and debts to be assigned to creditors. This was followed by stat. 13 Eliz. c. 7, s. 2, which directs an assignment by deed, and sect. 11 of which directs that lands and goods, acquired before the creditors are paid, shall be bargained, sold, delivered and *used* for the payment of creditors in the same way as other lands and goods which he had when he was declared to be bankrupt. Then followed stat. 1 Ja. 1,

c. 15, s. 13, which, reciting the insufficiency of the powers given to the commissioners touching debts due to bankrupts, enacts that they shall have power to grant debts, due or to be due, to the use of the creditors, and that the same grant or assignment shall so vest the property of the debt or debts in the persons to whom they are assigned, as fully to all intents and purposes as if the contract whereof such debts shall arise or grow were made with the said person or persons; and the bankrupt shall afterwards have no power to recover the same; using the same language which is found almost verbatim in stat. 6 G. 4, c. 16, s. 63. Statute 5 Ann. c. 22, s. 4, directs the commissioners to assign to the assignees the bankrupt's estate and effects; and the clause is copied by stat. 5 G. 2, c. 30, s. 26.

\*978] \*The construction put upon these statutes has been, that all future personal property, as well as present, passed by the original assignment by the commissioners to the assignees. This was decided in the case of *Kitchen v. Bartsch*, 7 East, 53, in which all the authorities were reviewed.

The new bankrupt statute, 6 G. 4, c. 16, s. 63, appears to us only to enact in express terms that which was law by the construction of the courts before: viz., that the assignment conveyed future property acquired before the certificate: and, consequently, whatever right an uncertificated bankrupt had before that statute in after-acquired property an uncertificated bankrupt has still; and a twice certificated bankrupt, where the estate does not pay fifteen shillings, is in the same position: and this was the opinion of the Court of Exchequer in *Fyson v. Chambers*, 9 M. & W. 460.

The remaining question, then, is, what was the right of an uncertificated bankrupt to after-acquired property, before the recent statutes.

The leading case on this subject is *Fowler v. Down*, 1 Bos. & Pul. 44, where it was laid down that the bankrupt has a right to such property against everybody but the assignees, and that it was not competent for a stranger to dispute his title. That was an action of trover, not for goods which had been in the bankrupt's possession, but which were in the defendant's hands and transferred to the bankrupt by the owner for a valuable consideration. The case, therefore, was not decided on the ground that actual possession gives a title as against a wrongdoer, but on the principle  
 \*979] that the bankrupt had a special \*property, a title of his own, without actual possession. It is true that, in giving judgment, Lord Chief Justice EYRE supposes that a new assignment to the assignees, of after-acquired property, was necessary to give them a title, which is incorrect: but that is not the sole ground on which he rests the case; nor do the other judges rely upon it. It is also to be remarked that the case of *Ashley v. Kell*, 2 Str. 1207, was mistakenly cited by BULLER, J. in *Fowler v. Down*, 1 B. & P. 48, as being an authority for the above-mentioned position, which it is not, as it is clear that, under stat. 5 G. 2, c. 30, the future effects of a bankrupt who has twice obtained his certificate and does not pay fifteen shillings in the pound do not pass to his assignees. But the point decided was expressly sanctioned by the Court of King's Bench in *Webb v. Fox*, 7 T. R. 391, and

prior to these cases, Lord KENYON had decided a similar point in the case of *Laroche v. Wakeman*, 1 Peake's N. P. C. 140, where an uncertificated bankrupt had assigned to the plaintiff, who maintained trover; and in the case of *Kitchen v. Bartsch*, 7 East, 53, it was considered as established. The same doctrine was held by GIBBS, C. J., in *Cumming v. Roebuck*, Holt's N. P. C. 172; who decided that the plaintiff, an uncertificated bankrupt, could sue for the non-acceptance of goods under a contract with him, if the assignees did not interfere: for he considered he might sue as their trustee. In *Ex parte Cartwright*, 2 Rose's Ca. B. 230, Lord ELDON treated the doctrine as fully established, so much so that he seems to have thought that a commission might be \*supported on his petition if the assignees did not interfere. And, finally, in *Drayton v. Dale*, 2 B. & C. 293, (a) all the judges of the King's Bench recognised this principle, though some of them put the case also on the ground of estoppel. [\*980]

Such are the authorities in favour of the right of an uncertificated bankrupt against all but his assignees: and certainly this has been treated as a well known principle, in this branch of law, perfectly well established for a long series of years. On the other side, the case of *Young v. Rishworth*, 8 A. & E. 470, is cited, and was that on which the Court of Queen's Bench relied in the decision of the present case. There the court decided that sect. 127 of stat. 6 G. 4, c. 16, was retrospective, so as to operate on a bankrupt who had obtained one certificate before the statute, a point to which the principal attention of the court was directed: but they also decided that, where there was a second certificate, the plaintiff's bankruptcy was a bar; probably on the ground that sect. 127 of stat. 6 G. 4, c. 16, vesting the right of action in the assignees, distinguished this case from that of an action by an uncertificated bankrupt. But the reasons for that part of the judgment are not assigned. If that conjecture is right, we think that ground is untenable, as we have before given our opinion that the rights of the bankrupt are the same in both cases. In the Court of Exchequer, on the argument of *Fyson v. Chambers*, 9 M. & W. 460, and on the argument of this case before us, it was suggested that *Young v. Rishworth*, 8 A. & E. 470, was distinguishable, because it was not averred in the plea \*that the money sought to be recovered was after-acquired property: and also that the plea was *prima facie* an answer, and that, if the assignees had permitted the bankrupt to act on their behalf, such fact ought to have been replied; (b) and that the case may be supposed to have been decided on one or both of these grounds. Upon consideration, we think that it cannot be supported upon either; but that not only the weight of authority but reason and convenience are in favour of the right of the bankrupt to sue. [\*981]

All future property and contracts vest in the assignees, by the words of stat. 6 G. 4, c. 16, ss. 63, 127, and by the construction put by the courts

(a) See *Chippendale v. Tomlinson*, 1 Cooke's B. Laws, 428, (8th ed.)

(b) On this point, reference was made to the argument in *Leach v. Thompson*, 1 Show. 296, 300, (reversed in Dom. Proc.; see *Thompson v. Leach*, 3 Lev. 284,) and to *Clark v. Calvert*, Taunt. 742.

on the words of the older statutes. But there must be property in the *bankrupt*, or *contracts with him*, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated.

\*982] The legislature, \*by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt, *bonâ fide* made and entered into without notice of the act of bankruptcy before the fiat: but there is no provision by the statute law for such payments, dealings, or transactions *after* the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts, for the assignees, who may, whenever they please, disaffirm his act, but, until they do so, his acts are all valid. If, then, an uncertificated bankrupt contracts on behalf of and for the benefit of his assignees, it is perfectly clear that he may sue on such contracts in his own name; and it is no plea that the property is vested in, or the contract made for the benefit of, the assignees, unless it contains an averment that they have interfered and desired the defendant to pay to them, any more than it would be a defence to an action by a factor, broker, or agent for another, to plead that the property belonged to, or the contract was made by the plaintiff for, his principal. Such a plea, to be a good answer, must aver that the principal has interposed, or disclose some other ground of defence.

We think, therefore, for the reasons which, on account of the great importance of the case, we have given at some length, the plea is bad for not stating, as was done in that in *Kitchen v. Bartsch*, 7 East, 53, that the assignees had interfered and required the defendant to pay to \*them: \*983] and we all think that the judgment must be reversed, and judgment given for the plaintiff on the demurrer to the last plea.

Judgment reversed. (a)

(a) On the above judgment being delivered, Willes mentioned to the court that there were issues of fact to be tried before there could be final judgment, upon which Parke, B., said: "If we had known that before, it might have saved a great deal of trouble; for the writ of error was premature, and ought to have been quashed, as was done in *Tolson v. Kaye*, 6 Man. & G. 536. However, you have our judgment now, for better, for worse." Afterwards, on the motion of G. Atkinson for the plaintiff, the pleadings raising the issues of fact were struck out by the Court of Queen's Bench, on the ground of an arrangement between the parties; and the plaintiff had judgment.

Ex relatione Willes.

## \*EASTER VACATION. (a)

[\*984]

## FRANCIS v. STEWARD.

*A citation, stating only, as the matter of charge, that the party cited (a parishioner of G.) wilfully and contumaciously obstructed or at least refused to make or join or concur in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church, does not show an offence cognisable by the Ecclesiastical Court.*

*To a citation framed as above, the parishioner appeared under protest. The judge of the Ecclesiastical Court overruled the protest, and ordered the party to appear absolutely. He thereupon declared in prohibition, setting forth the citation and the other proceedings. On demurrer to the declaration,*

*Held, that the declaration was good, the citation being insufficient to give jurisdiction.*

*And that the suit in prohibition was not premature.*

**PROHIBITION.** The declaration stated that heretofore, to wit, 19th November, 1842, defendant caused a citation to be issued out of the Arches Court of Canterbury against the plaintiff in prohibition, addressed to all and singular clerks, &c., in the province of Canterbury, reciting letters of request from the official principal of the Episcopal Consistorial Court of Norwich, addressed to Sir Herbert Jenner Fust, official principal of the Arches Court of Canterbury. The letters were as follows: "Whereas Edward Steward, of the city of Norwich, gentleman, is desirous of instituting a certain cause or business of promoting the office of the judge against John Francis, a parishioner and inhabitant of the parish of St. George of Colegate, situate and being within the city and diocese of Norwich and province of Canterbury, and of calling upon him the said J. Francis to answer to certain articles or positions to be objected to him touching and concerning his soul's health and the lawful correction and reformation of his errors and excesses, particularly in respect of his having wilfully and contumaciously obstructed or at least refused to make or join or concur in the making of a sufficient levy, rate, or assessment for providing funds in order to \*defray the expense of the necessary repairs of the parish church (including the chancel, which, by the custom of Norwich, the parishioners are bound to repair,) of the said parish of St. George of Colegate within the said city and diocese of Norwich; and whereas difficulties may arise wherein the parties may require the aid and advice of civilians," &c.; the letters then stated the application of Steward for letters of request, that he might commence the suit in the Arches Court, and proceeded, on the part of the official principal of Norwich, to request that the official principal of the Arches Court would permit a citation to issue under seal of the Arches Court against the now plaintiff Francis, to appear, &c., to answer to certain articles or positions to be objected to him, touching, &c., (stating them as above,)(b) in a cause or business of promoting the office of the judge by the said E. Steward against the said J. Francis, and to hear and determine, &c. The declaration set forth the rest of the cita-

(a) The court sat in banc on the 9th and 10th of May.

(b) Only omitting the words "which, by the custom of Norwich, the parishioners are bound to repair."

tion, ordering that Francis should be cited to appear before the official principal or some other judge of the Arches Court in the Common Hall of Doctors' Commons, &c., on, &c., to answer to certain articles, &c., touching, &c., as in the recital of them last above mentioned.

The declaration then stated that Francis was served with the citation, and appeared in the Arches Court by William Pritchard his proctor, but under protest, and that, in extension of the said protest, the said proctor, in a certain act on petition then duly exhibited in the said cause, alleged (after setting forth the material part of the citation): That the said Francis was unlawfully and wrongfully cited in manner and form and to the

\*986] \*effect aforesaid, by reason that it did not appear by the said citation

that the now plaintiff had been guilty of, or was charged with, any ecclesiastical offence cognisable by the said court, or any other ecclesiastical court, in the premises: That by the said citation it did not appear that the said parish church of St. G. C. ever was, or then was, in want of any repairs whatever, or that any vestry for making any rate to defray the expense of any such repairs had been duly or at all called or held, or that the now plaintiff was ever present in any vestry in the said parish when such rate, or any rate for the repair of the said church, was ever proposed or considered, or that he ever took any part whatever in the proceedings of any such vestry: That it was not competent for any person to promote the office of the judge, or otherwise to proceed criminally, against any one or more individual parishioners or inhabitants of a parish for or in respect of the acts, matters or things charged or alleged against the now plaintiff in the said citation: And that the now plaintiff was not bound to appear in the said cause or business to the said citation: and therefore the said W. Pritchard prayed the judge of the Arches Court to pronounce for such his protest, to dismiss the now plaintiff and his party from the said suit and all further observance of justice therein, and to condemn the now defendant in costs. The declaration stated that Thomas Blake, the proctor for the now defendant, alleged in reply: That it did appear by the said citation that the now plaintiff was charged with an ecclesiastical offence cognisable by the said court: and therefore the said T. B., denying relevancy, &c., prayed the judge of the said court to overrule the protest and assign the said W.

\*987] Pritchard to appear absolutely for the now plaintiff, and to \*condemn the now plaintiff in the costs of such protest. The declaration went on to state that Francis's proctor thereupon alleged and prayed as before: that the cause came on for hearing before Sir H. J. Fust upon the matter of the protest and replies, and was argued by counsel on both sides: and that, on February 8th, 1843, the said Sir H. J. Fust pronounced his judgment in the said cause, whereby he overruled the said protest, and assigned the said W. Pritchard to appear absolutely for the now plaintiff in the said cause. "And as well the now defendant as the said Sir H. J. Fust, Knight, the judge aforesaid, are about to proceed to compel the now plaintiff by his said proctor to appear absolutely in the said cause, and answer

the now defendant in the same. And this the now plaintiff is ready to verify: wherefore he prays judgment, and that her Majesty's writ of prohibition may issue," &c., "to the said Sir H. J. Fust," &c., "inhibiting him from proceeding further in the said cause against the now plaintiff."

Demurrer and joinder.

The demurrer was argued in last term. (a)

Sir F. Thesiger, solicitor-general, for the defendant in prohibition. The suit in prohibition is at any rate premature. The citation does, on the face of it, show that a matter of ecclesiastical cognisance is in question; and it need not do more: it is merely process, in which, according to the opinion expressed by Sir H. J. Fust in *Steward v. Francis*, 3 Curt. 209, 215, 216, in the Arches Court; it is enough \* "that a general description of the offence should be set forth, in order that the party may know the charge he has to meet, and whether the offence is of ecclesiastical cognisance." The forms of citation in 3 Burn's Ecc. Law, 259, 260, 9th ed. by Phillimore, are as general as that used here. The charge made in a citation is expanded in the articles: the plaintiff should have waited to see whether, in those, an offence within the jurisdiction of the ecclesiastical court was sufficiently alleged. As to the form of statement in this citation, it is clear that, if a parishioner wilfully and contumaciously refuses to concur in repairing the parish church, this is a matter of ecclesiastical cognisance. Such repair is shown by TINDAL, C. J., in *Veley v. Burder*, 12 A. & E. 265, 302, to be a duty which the parishioner cannot throw off; and, although, if he attends a vestry where the question of repair is considered, he may fairly withhold his concurrence, yet, if he does so wilfully and contumaciously, he commits an offence within the spiritual jurisdiction. The present citation, therefore, does indicate an offence, sufficiently at least to show *prima facie* jurisdiction in the court; and, as was said by Lord DENMAN, C. J., in delivering judgment in *Regina v. Baines*, 12 A. & E. 210, 231: "When the court assumes to act within its jurisdiction, and facts appear which *prima facie* give it jurisdiction, we are not to presume the existence of other facts which might either deprive the court of jurisdiction, or, if true, be a defence for the party libelled." So, TINDAL, C. J., in *Taylor v. Clemson*, 2 Q. B. 978, 1031, after noticing the argument "that the same rule will apply to these proceedings which is held to apply to all other inferior \*jurisdictions, that, unless sufficient appears upon the face of the proceedings themselves to show that the jurisdiction exists, such proceedings are altogether void," says, "Admitting such to be the rule of law," "the question is, whether, either expressly or by necessary intendment, the proceedings do of themselves show that they were warranted by the statute. The proceedings of the Ecclesiastical Court, therefore, in the present case, are not as yet open to objection. *Cooper v. Wickham*, 2 Curt. 303, will be cited for the plaintiff: but in that case (where the question arose on articles, not on a citation) it was not

(a) April 26th. Before Lord Denman, C. J., Patteson, Williams and Wightman, J.

shown that the necessary repair of the church was impeded, or that the adverse vote of the churchwarden was contumacious: on which grounds Sir H. J. Fust, in *Steward v. Francis*, 3 Curt. 209, 226, distinguished this case from *Cooper v. Wickham*, 2 Curt. 303, and overruled the protest of the now plaintiff in prohibition. In *Greenwood v. Greaves*, Hagg. Ecc. Rep. 77, where a decree rejecting articles was affirmed by the Court of Delegates, the articles did not show any contumacious refusal to make a proper rate; and this objection was relied upon by the court. The citation, in the present case, does not expressly aver that the church wanted repair; but that appears by necessary intendment. Nor does it in form allege that a vestry was held, and that Francis took part in the proceedings: but that is matter of evidence, and is no part of the information which ought to be furnished by the process.

*Roebuck*, contra. It is true that, in the passage cited from *Veley v. Burder*, 12 A. & E. 302, TINDAL, C. J., states the \*repair of the parish  
 \*990] church to be a duty which the parishioners are compellable to perform. He adds, (12 A. & E. 303,) that, when they are convened to make a rate, the only question for their consideration is, "how, and in what manner, the common law obligation, so binding them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect." But as to the manner in which this duty is to be enforced he lays down nothing positive; he suggests only that the Spiritual Court "may, perhaps, be able to compel the churchwardens to raise the money by a rate, or may punish the parishioners who wilfully refuse either to join in such rate or pay their respective proportions." P. 312. And afterwards, in adverting to the powers of the Spiritual Court, he says, p. 314: "if that court is empowered" "to compel the churchwardens to repair the church by spiritual censures," "to punish such of the parishioners as refuse to perform their duty in joining in the rate," &c., "the same power will still remain with the Spiritual Court, notwithstanding the decision of this case. The extent and nature of those powers not being now before us, it would be at once unnecessary and improper to give any opinion upon them."

In the present case: First, on the citation itself no ecclesiastical offence is stated: Secondly, intending every thing possible in favour of the citation, no ecclesiastical offence appears. First, on the words "obstructed, or at least refused to make, or join or concur in the making of, a sufficient levy, rate or assessment for providing funds in order to defray the expense of the  
 \*991] \*necessary repairs of the parish church," it does not appear that there was a meeting; that Francis was present or could have voted; that a rate was proposed at the meeting, if held; that the church was out of repair; or that any evil followed the alleged obstruction and refusal. The present case is substantially the same as *Cooper v. Wickham*, 2 Curt. 303, and is not effectually distinguished from it by the judgment in *Steward v. Francis*, 3 Curt. 209. A citation is not mere process, but is in the nature

of a criminal pleading: there might be a solemn judgment upon it, from which an appeal would lie. The case is analogous to those in which a writ de excommunicato capiendo has been set aside because the significavit or the writ was too general and uncertain; *Rex v. Sneller*, 1 Vern. 24; *Rex v. Fowler*, 1 Salk. 293, cited 10 Vin. Ab. 521, tit. *Excommunication*, (E,) pl. 21, 22, 23. The certainty required in the citation as well as the articles, on a charge like the present, is described by Sir H. J. Fust, in *Cooper v. Wickham*, 2 Curt. 303; (a) and he says that "in all cases of criminal proceedings, the charge should be fully stated in the citation, that by the refusal of the rate, and through the neglect or misconduct of the churchwardens, the church is not in a sufficient state of repair;" supporting that opinion by a reference to *Millar v. Palmer*, 1 Curt. 540. It may be said that the judgment in which these observations occur related to the articles; but the articles must agree with the citation; that which appears in the one must also appear in the other; *Brecks v. Woolfrey*, 1 Curt. 880, 882, 883. Secondly, assuming that the facts omitted in the citation \*could be intended, refusal of a rate is not in itself an ecclesiastical offence. [\*992]

A vestryman cannot be made criminally answerable for the vote he gives for or against a rate; his case is analogous to that of the juryman in *Bushell's Case*, Vaugh. 135. He is bound to decide according to his opinion. TINDAL, C. J., in *Veley v. Burder*, 12 A. & E. 303, compares the duty of repairing the church to that of maintaining roads and bridges; but that is an obligation incumbent upon a community, not on individuals; and the punishment, where the church was not repaired, was by excommunication or interdict, which fell upon the whole parish, not on particular persons. The allegation here that the party refused or obstructed "wilfully and contumaciously" can make no difference: contumacy is not an offence known to the law, like heresy or brawling; and it lies upon those who instituted this suit in the Ecclesiastical Court to show by authorities that the conduct they complain of was illegal. Lord DENMAN, C. J., makes an observation to the same effect in *Burder v. Veley*, 12 A. & E. 233, 247.

Sir F. Thesiger, solicitor-general, in reply. A citation is process; its object is only to bring the party into court; and there are no pleadings upon it. It is contended that no ecclesiastical offence appears by this citation, because a parishioner attending the vestry may exercise an uncontrolled discretion in voting for or against repairs. But the judgment of the Court of Exchequer Chamber, in *Veley v. Burder*, 12 A. & E. 265, shows that the discretion is to be exercised within some limits. A parishioner cannot say "it is indifferent to me whether \*the church stands or falls." [\*993] A vote, accompanied by such a declaration, would be a wilful and contumacious refusal. [WIGHTMAN, J. Suppose he were of opinion that repair was not wanted.] That would be matter of proof, and, if shown, might rebut the charge of contumacy. [WIGHTMAN, J. Suppose the re-

(a) Roebuck read several parts of the paragraph, pp. 311—314, beginning "The fourth article."

pair is voted without his concurrence, so that the refusal is unimportant.] It may be important so far as his own conduct is in question. [PATTERSON, J. Still the necessity of repair must be shown.] That is not denied: but, if the citation shows an act done which may, under certain circumstances, be an offence, this court will not intend against the jurisdiction. [PATTERSON, J. The dicta in *Veley v. Burder*, 12 A. & E. 265, assume that the church is out of repair.] Assuming that, the parishioners, according to the judgment there given, may debate how the duty of repair may be best performed, but not whether it shall be performed or not; and, if the duty of repair is not done, the Ecclesiastical Court may punish such as refuse to join in the rate by imprisonment, the penalty now substituted for excommunication. [PATTERSON, J. Is there any instance of a single parishioner being excommunicated for this cause? In Archdeacon Hale's *Precedents in Causes of Office, &c.*, London, 1841, there are many instances of monitions to repair; I do not know if there are any of excommunications. *Roebuck*. The monitions are to the churchwardens, not to parishioners.](a) The passage cited on the other side from *Cooper v. Wickham*, 2 Curt. 314, is explained by the

•994] judgment of Sir H. J. Fust, in *Steward v. Francis*, 3 Curt. 217; and the learned judge there, speaking of the present citation, says, 3 Curt. 227: "The charge goes on, 'for having wilfully and contumaciously obstructed,' if that had been the specific offence, I should have thought that the charge had not been sufficiently made out, but there is a second count, for 'contumaciously refusing to make, or join, or concur, in the making of a sufficient levy, rate, or assessment, for providing funds in order to defray the expense of the necessary repairs,' in either of these cases, accordingly as the proofs may turn out, the party will be guilty of one or other of the offences laid to his charge." It is therefore matter for proof, on the further proceedings, whether the plaintiff in prohibition has wilfully and contumaciously refused or not. If, as was suggested on the other side, he was not present, or not entitled to vote, those facts will show that he did not wilfully and contumaciously refuse. If the common law has imposed the obligation of repairing, and it is wrongfully omitted, there is a wrong without remedy if the Spiritual Court cannot interfere. [WILLIAMS, J. According to your argument, in *Veley v. Gosling*, 3 Curt. 253, all the persons who left the vestry without making a rate were liable in the Ecclesiastical Court.] If they did it wilfully and contumaciously. [PATTERSON, J. All depends on those two words.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the court.

This declaration in prohibition sets forth a citation from the Dean of the Arches, founded on letters of request from the Consistory Court of the

•995] Bishop of \*Norwich, in a suit against the plaintiff touching his soul's health and for correction of his errors and excesses, "particularly in respect of his having wilfully and contumaciously obstructed or

(a) Roebuck referred to the analysis of these precedents given by Dr. Lushington, when delivering judgment in *Veley v. Gosling*, 3 Curt. 253, 285—287.

at least refused to make or join or concur in the making of a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church." The declaration alleged that by the said citation the plaintiff was not charged with any ecclesiastical offence cognisable by any ecclesiastical court. A general demurrer to this declaration has been argued before us.

No question was made whether a citation must not contain the charge of an ecclesiastical offence. In the ancient constitutions a remedy is applied to many abuses of process by citing persons out of the jurisdiction wherein they reside, and finally the act of H. 8, 23 H. 8, c. 9, (commonly called the Bill of Citations,) was passed to prevent this great and frequent oppression, whereby persons often found themselves excommunicated and ruined without notice of the proceedings against them. But it is constantly assumed that they set forth on the face of them a spiritual offence.

Many such offences were well known by their proper descriptions; heresy, incontinence, brawling, subtraction of the various kinds of ecclesiastical dues, &c. It was not urged that there can be no offence where the acts charged are incapable of technical designation, but that, if the offence consist of special circumstances, these should appear on the citation; not unlike the proceedings of our own courts, where writs were provided in common form for known causes of action, but an \*action on the case might be founded on special facts converting what might have been innocent in itself into an injury to the party complaining, and a writ was framed for the occasion. [\*996

The solicitor-general maintained that the words of charge which I have just read from the citation impute a spiritual offence. Not denying the right of every parishioner to refuse to make, or join or concur in making, a church rate, nor even the right to vote against the imposition of a rate, he still urged that to do either "wilfully and contumaciously" is a spiritual offence, and that the wilfulness and mode of refusing, and the accompanying acts inferring that contumacy which thus became the essence of it, need not be farther particularized in the citation, but may be introduced for the first time to the knowledge of the accused as evidence in support of the charge. In the proceedings of any court, where an accusation is preferred, the minimum of allegation is the maximum required in proof: the prosecutor in several counts (as the charges in the *præsertim* are called by learned ecclesiastical judges) must be entitled to succeed if he establish any one of them, and, consequently, if this citation is good, the present plaintiff will incur spiritual censures though convicted of no other fact than that of a refusal to join in making a church rate.

We are by no means satisfied that the refusal to join in making a church rate can be an offence in a parishioner, because it cannot be necessary for all the parishioners to join in making it: a majority may do this act; and, if it is done, what offence can there be in refusing to concur in it? If no rate is made, it can hardly be conceived that that default should be produced

\*997] \*by the refusal of a single parishioner to concur in imposing one. If indeed he does any thing for the purpose of defeating the measure, if he is guilty of any violence or fraud, if he bribes or intimidates other men from voting for a rate, if he deceives parishioners as to the time or place of meeting, if he persuades others to absent themselves, or even (according to one supposition made at the bar) absents himself in order to prevent a regular assemblage, these may be criminal acts; but they are not the refusal of a church rate, nor evidence of such refusal; they are wholly independent of the mere refusal, and are capable of being distinctly stated.

But, farther, the sufficiency of this charge in its more cogent terms, that the plaintiff wilfully obstructed the making of a church rate, may well be questioned. It might be the duty of a parishioner wilfully to obstruct it. A parish meeting being convened to consider of granting such rate (though even that is not stated in the present citation,) the parishioners go to the meeting to take part in its deliberations and exercise their judgment on the question raised. Must they not exercise it with freedom? Are they bound to vote one way? On the contrary, the law permits them to object to the grant proposed; to argue that it ought not to be made; to vote for refusing it. Persons so acting may be truly said to wilfully obstruct the making of a rate: that phrase would be generally supposed to point at similar proceedings; yet they are all undoubtedly lawful. Each member of this deliberative assembly may be bound by every principle to take the part now supposed. Can he be treated as a criminal in any English court for the performance of this acknowledged duty?

\*998] \*There is an answer, indeed, to this and every other objection, which sweeps them all away. The acts of the plaintiff denounced in the citation are therein alleged to have been both wilfully and contumaciously done. Now the first of these two words adds nothing to the charge of refusing: all refusal is wilful. It may be doubtless a word of great force when connected with acts of obstruction; for these may be unconsciously done by a person ignorant of their tendency, and can never be criminal without the knowledge of it. Can, then, a wilful refusal, possibly an act of duty and perfectly innocent, be transmuted, by the mere addition of a reproachful term, into a crime? It conveys no idea to the hearer's mind but that the speaker disapproves or resents the conduct to which he applies it. He may, perhaps, deem that conduct in itself contumacious, or may consider it as deserving the epithet from other facts antecedent or contemporaneous. Can any thing be more easy than to describe these facts, or more dangerous than to treat another as a criminal without informing him how he is supposed to have become so? Our own forms of indictment and declaration have been constantly held defective where, the facts averred falling short of the legal definition, an attempt has been made to eke it out by adverbs either vituperative or commendatory. The courts refuse to infer guilt from them on the one hand, or a due course of legal proceeding within

lawful jurisdiction on the other. Nor is this strictness imposed by technical rules: it grows out of the first principles of justice.

There are, however, certain authorities, the decisions of the spiritual courts themselves, which we are bound respectfully to consider and examine. They underwent \*a careful and minute discussion from the emi- [ \*999  
nently learned person whose judgment is now questioned, in the course of delivering that judgment. He founded it on some of these authorities, and distinguished it from some others which were pressed as leading to the opposite conclusion.

The case of *Greenwood v. Greaves* was formally adjudged to be precisely in point. The report is in 4 Hagg. Eccl. Rep. 77. Two of the churchwardens of Dewsbury cited the two other churchwardens and ten parishioners for refusing to make, or concur in making, a rate or assessment, or sufficient rate or assessment, for the repairs of the parish church, and for the lawful and necessary expense of the churchwardens relating to the parish church, and incidental to their said office. The material article set forth a regular vestry meeting to consider certain statements and estimates of the charges for the ensuing year, relative to the repair of the church, and providing bread and wine for the holy communion, and other incidental expenses, and to make a rate for defraying the same; that a rate or assessment was proposed according to a moderate estimate of the expenses which were lawful and necessary; notwithstanding which the parties cited "objected to, and did refuse to make or concur in making a rate, to the amount necessary to defray the charges and expenses;" but voted for one wholly inadequate; and "by reason thereof the necessary and legal repairs cannot be done, nor other expenses necessary" for divine service "be defrayed." The Chancery Court at York rejected the articles, which on appeal were brought before the \*Delegates BOLLAND, B., BOSANQUET and TAUN- [ \*1000  
TON, Js., and Drs. Daubeny, Haggard and Curteis. This learned tribunal dismissed the appeal with costs. Their unanimous judgment is accompanied by no statement of their reasons. But some observations are reported which they interposed in the course of the unsuccessful argument. "There is no precise allegation that the church is out of repair," 4 Hagg. Eccl. Rep. 82. If this were necessary, the single defect was fatal to the articles, and no other required notice. The court also said to the counsel, "The question here is as to two assessments;—which sum shall be adopted." "If the court were to say that the higher estimate shall be adopted, it will then decide on the quantum of rate, and your own case from 1 Modern, 194, 236, *Rogers v. Davenant*, says, that the court cannot assess the parishioners." Here is a second deathblow to the articles; and the appeal was disposed of. But the delegates, or some or one of them, go a little farther, and indicate what the articles might have alleged, and what the court might have thought of a state of facts which had no existence. "If it had been alleged that the parishioners had contumaciously, obstinately, and pertinaciously refused to make a rate, or that they would only make such a rate as

was manifestly collusive, there *might* be *some* ground for proceeding against them: but such a state of things is not alleged to exist in this case: there is no appearance of any wilful contumacy, either avowedly or impliedly." With unaffected deference to the learned judge, it might be doubted, but for his view of what fell from the court, whether, instead of being a decision

\*1001] in point, these words amount to any decision at all. In \*the first place they are not applied to a citation but to articles; but, if they are to be considered as a form prepared by the judges, that form has not been pursued here. The words "obstinately, and pertinaciously" are by no means insignificant: they approach a great deal nearer to the precise ground of accusation than the very general complaint of contumacy. We apprehend that the judges meant only to say that words of that nature are indispensable, without entering upon the question whether a pointed charge may not also be required. Whatever their inclination of opinion, it is expressed with no degree of confidence. "There *might* be *some* ground for proceeding" falls infinitely short of a declaration that the form would be sufficient. Our brother judges who composed that court were not in the habit of deviating from their line of duty by obtruding on the world their opinions on a case not brought before them. They would not have been likely to draw up the form of a citation for future use: and no judge, however enlightened, knows how he would decide a novel point which he has not heard debated. The only authority, then, in support of the judgment which we are considering appears to fail entirely.

But some authority is adduced against it; the authority of the same learned judge himself. In *Cooper v. Wickham*, 2 Curt. 303, a churchwarden was cited for having, at a vestry meeting for the purpose of a church rate, voted in favour of a resolution which declared church rates at all times bad in principle and unjust in practice, and quite uncalled for at the present time, and adjourned the meeting for twelve months; and for having voted

\*1002] \*against a church rate duly moved and seconded. The citation was not objected to; but the articles alleged that the roof of the church of Shepton Mallett "was in so dilapidated a state, that the rain came through the same into the body of the said church, to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the inconvenience of the officiating minister," "who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading-desk, and of the congregation." The articles further charged that the meeting was called for imposing a church rate, and the party voted for the resolution above mentioned, and also presided at a division where it was carried by a majority.

The learned judge held these articles insufficient. He considered them as equivalent to a charge of refusing not only the rate proposed but any rate whatever: but he then expressly denied that the refusal of any rate by a churchwarden was an ecclesiastical offence, observing that the court is not to presume or conjecture any thing in a criminal proceeding. He did not

enter upon the inquiry whether the churchwarden's acting in avowed furtherance of his opinion that church rates were always "bad in principle and particularly unjust in practice" were evidence of contumacy in the refusal, thinking the articles deficient herein, that they did not show that the dilapidated and unroofed church continued out of repair at the time of preferring the articles. He also remarks that it was not criminal, but might be highly proper, to consider in vestry the necessity for the repairs and the estimate of expense, which possibly may have been thought too high by the parishioners. This decision was not unreasonably pressed \*on Sir H. Jenner Fust, when the present citation was impugned before him. But in Dr. Curteis's report the argument at the bar is briefly summed up, while the judgment of the court occupies a very large space. [\*1003

After careful examination of these two cases, it is hard to discover any ground for excuse in that former case which is not in the present. Mr. Cooper was charged with refusing to join in making any church rate; Mr. Francis with refusing to join in a particular rate; the latter being a parishioner only, the former both parishioner and churchwarden. Mr. Cooper was held guiltless, because the continuance of the dilapidation was not alleged, nor is it alleged against Mr. Francis. In Mr. Cooper's case the court could not conjecture or presume that the church may not have been completely restored between the citation and the articles: is that conjecture or presumption to be made between the vestry meeting and the citation? Mr. Cooper was excused for refusing to join in making any rate on the declared ground that church rates are always bad in principle, from a suggestion that the rate thus proposed might possibly have been thought by him higher than a fair estimate of necessary expense demanded. "I do not know" (says the learned judge) "that it is an offence in a churchwarden to vote against a rate of 2*d.* in the pound, unless it be shown, that it was adequate and only adequate, and not excessive, beyond the purpose for which it was intended to be applied," 3 Curt. 223, *Steward v. Francis*. Such a vote would appear still less objectionable in a parishioner who holds no office. If the argument of counsel had been as fully reported as the judgment, we might \*have there found a complete demonstration that Mr. Francis was [\*1004 entitled to the benefit of this consideration, and that it would have shown the absence of all offence.

The citation is not in respect of a refusal to join in making any rate, but the refusal to join in making a *sufficient* rate for *necessary* repairs. The refusal to make a *sufficient* rate raises a direct implication that Mr. Francis was willing to join in making some rate, and that his refusal to join in one which the accuser calls sufficient might proceed from his perfect knowledge that it was much more than sufficient, and excessive beyond its legitimate purpose.

This appears to be the natural meaning of the citation: and, if so, it virtually calls on the Ecclesiastical Court to do what it has uniformly disclaimed the power to do, determine on the amount of assessment to be

imposed. The epithets *sufficient* and *necessary* have possibly by some inadvertence changed places; but however placed, the word *sufficient* imports that there is no offence until, on inquiry, the court has satisfied itself that the proposed amount was not more than necessary for the sufficient reparation of the church, and that the parishioner voted against the amount proposed from some improper motive, and in violation of his real opinion. The learned judge himself observes, (p. 227,) that, if the charge had been “for having wilfully and contumaciously obstructed,” and that had been the specific offence, he “should have thought that the charge had not been sufficiently made out;” but he adds “there is a second count, for ‘*contumaciously refusing*,’ ” &c.

There may be some difficulty in reconciling this sentence with some  
 \*1005] language in the preceding paragraphs, \*or with the two modes of charge in the præsertim, or to understand how *obstructing* can be less an offence than *refusing*, each act being supposed wilful and contumacious.

But here attention must be drawn to the citation as it appears in these pleadings. (His lordship here read from the citation the words describing the alleged offence; ante, p. 995.) According to the strict rules of criticism, at least of legal criticism, as applied to instruments which ought to show criminal jurisdiction, the words “wilfully and contumaciously” would appear to be confined to the obstruction, and by no means necessarily connected with the refusal. But if they were, we must examine the force of the word “contumaciously.” To an argument at the bar that there can be no contumacy without a monition, a previous monition—*monitione præmissâ*,—the learned judge gives this answer. “It is said that a person cannot be contumacious unless there has been a monition issued against him, which has been disobeyed; and perhaps that is correctly argued,—what then? The words ‘contumaciously obstructing’ import ‘that there has been a monition,’ for if contumacy consist in disobeying a legal order, it follows, from the use of the word ‘contumacy,’ that there has been such an order,” 3 Curt. 226. If the whole train of circumstances necessary to make out an offence must be inferred from the use of a word which would be inapplicable unless those circumstances existed, the art of criminal pleading in all our courts will be reduced within very narrow limits indeed. “I have also been told” (the learned judge continues, p. 227) “that a party should be excommunicated, that being the extent to which the court can  
 \*1006] proceed, in order to compel a \*parishioner to provide the necessary means for repairing the church, and that this cannot be done, *sine monitione*; be it so,—if no monition has issued, then the court will not proceed (if that is the law) to excommunicate the party. But it is possible that a monition may have issued, and then the party may be liable to be excommunicated; or if there *has been* no *preceding* monition, then the party may have a monition issued against him, in the course of these proceedings,” page 227. If it is here meant that a charge of contumacy

in the citation may be established by proof of acting inconsistently with a monition issued afterwards, we can neither assent to such a proposition, nor easily believe that it emanated from the learned judge. It seems much more probably a misconception in the reporter or an erratum of the printer.

Upon the whole, we think ourselves bound to pronounce the citation bad, as describing no spiritual offence. And we think it much better for the party to apply for prohibition in the first stage than after expense incurred.

Judgment for plaintiff.

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The QUEEN v. The GRAND JUNCTION Railway Company.

Reported, 4 Q. B. 18.

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The case of *Lockwood v. Wood*, in the Queen's Bench and Exchequer Chamber, will be published in the next volume.

END OF EASTER VACATION.



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 In such an action, the facts appearing as above stated, the statute of limitations runs from the time when the security is set aside, it not appearing that the consideration has failed before that time. And the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid. *Huggin v. Coates*, 432.  
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- I. To excite unlawful confederacies, 16. INDICTMENT, II. 1.
- II. To prevent witness from appearing at trial, 44. INDICTMENT, II. 5.

### ATTESTATION.

Of warrant of Attorney, 181. WARRANT OF ATTORNEY, I.

### ATTORNEY.

#### I. Articled clerk.

- 1. Attorney's right to dismiss for misconduct.

Wherever, from the state of the record at nisi prius, there is any thing to be proved by the plaintiff, he is entitled to begin. The rule is the same in actions of contract and in actions of tort.

In covenant, against an attorney for dismissing plaintiff, an articled clerk, from his service, defendant pleaded that plaintiff, after the making of the articles, and before the discharge, conspired and combined with I. G., another attorney, by the unlawful means after mentioned to induce plaintiff's clients to leave him and employ I. G., and that plaintiff, in pursuance of the said combination, disclosed defendant's professional secrets to I. G., calumniated defendant to his clients, &c. (alleging various other acts of misconduct as done in pursuance of the combination :) whereby defendant was prevented from instructing plaintiff and retaining him in his services, &c.; and defendant, just before the discharge of plaintiff, discovered and had notice of the premises, and was therefore forced to discharge, and did, so soon as he discovered the premises, discharge plaintiff from his service, as he lawfully, &c. Replication, de injuriâ: Issue thereon.

*Held*, that the plaintiff was entitled to begin.

*Held* also, that, on the above plea, the defendant was bound to show that he knew of the misconduct alleged in justification before he dismissed the plaintiff.

And *quære*, whether he ought not also to have shown that the acts complained of were done in pursuance of the alleged combination. *Mercer v. Whall*, 447.

- 2. To attorney in Wales on the shilling roll: His right to admission as an attorney in the courts at Westminster.

A duly admitted attorney of one of the courts of Great Sessions in Wales, who was practising as such at the time of the passing of stat. 11 G. 4, and 1 W. 4, c. 70, and is enrolled on the shilling roll under that act, sect. 16, and practises accordingly in the superior courts at Westminster in actions against persons residing, at the commencement of the suit, within the principality, is a "practising attorney or solicitor in England or Wales," within stat. 6 & 7 Vict. c. 73,

a. 3. And a person who, since that act came into operation, has been articled to such attorney as a clerk, and has paid the higher duty on his articles of clerkship, under stat. 55 G. 3, c. 184, sched. Part 1, in order to admission as an attorney in the courts at Westminster, is entitled to have an affidavit made and filed, and the articles of clerkship registered, according to stat. 6 & 7 Vict. c. 73, s. 8. *Ex parte Davies*, 564.

- 3. Affidavit of admission, 564. Antè, 2.

- 4. Registry of articles, 564. Antè, 2.

#### II. Clerk, generally.

Liability of attorney for acts of, 804. MISREPRESENTATION, I.

#### III. How far bound by acts of partner.

When not by a guarantee in name of firm, 833. GUARANTEE.

#### IV. Liability to third party.

- 1. For false imprisonment under a bad warrant, 99. BANKRUPT, IX.

- 2. To sheriff, for misrepresentation by clerk, 804. MISREPRESENTATION, I.

- 3. On acts of partner, 833. GUARANTEE.

#### V. Evidence of improper motives.

Improper delay in giving information, 99. BANKRUPT, IX.

#### VI. Attestation of warrant of attorney by, 181.

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#### VII. Holding municipal office.

What not such an office as to entitle him to compensation for its loss, 402. STATUTE, XLI. 3.

### ATTORNEY, GENERAL.

His authority with respect to prosecution for offences relating to the customs, 348. CUSTOMS, II. 1.

### ATTORNEY, WARRANT OF.

WARRANT OF ATTORNEY.

### AUDIT.

Of overseer's accounts, 878. POOR, IX. 1.

### AUTHORITY.

- I. Revocability of, 873. LANDLORD AND TENANT, IV.

- II. To pay rents to mortgagee, 373. LANDLORD AND TENANT, IV.

- III. For signature by agent, when it must appear, 506. POOR, XXV. 1.

- IV. To prosecute.

Whether to be shown on face of indictment, 348. CUSTOMS, II. 1.

- V. Pleading.

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- VI. Evidence.

- 1. Previous acts, 115. BANKRUPT, III.

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## AWARD.

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## BAIL.

On proceedings in bankruptcy.

Cancellation of bond on render of principal, 398. BANKRUPT, II.

## BAILMENT.

To innkeeper, 164. INNKEEPER, I.

## BANK OF ENGLAND.

Payment into, by official assignee, 322. BOND, II. 1.

## BANKERS.

## I. Banking copartnership: evidence.

Stamp-office return: jurat: time.

A certified copy from the Stamp-Office of the return filed there by a banking copartnership, under stat. 7 G. 4, c. 46, ss. 4, 5, is evidence, under sect. 6, that a person named in such return as a partner was so at the time of the jurat, though it be not proved that such return was delivered at the stamp-office between February 28th and March 25th, and though the return itself contain no date except that of the jurat, which is not between the above-mentioned days, and is much later than March 25th.

The return was sworn to before Joseph Lomer, who was proved to be a magistrate of Southampton, but the words of the jurat were only "Sworn before me at the town and county of Southampton, 9th November, 1839, Joseph Lomer:" not further stating the authority to administer the oath. *Held* sufficient.

Judgment was entered up by a banking company against a public officer of another banking company, under stat. 7 G. 4, c. 46, ss. 9, 12; and a sci. fa. issued for the purpose of having execution, under sect. 13, against individual members. One of the alleged members obtained a rule nisi for setting aside the warrant of attorney: and the Court thereupon ordered an issue to be tried, upon the question, among others, whether the shareholders of the latter company were indebted to the former in any, and what sum. *Held*, that the defendants on such issue could not object that some parties on the record were members of both companies. *Bosanquet v. Woodford*, 310.

## II. Action by or against public officer: judgment against individual members.

Issue on question of debt between two companies: objection that parties are members of both, 310. *Antè*, I.

## BANKRUPT.

## I. Court of Review; authority and jurisdiction.

To discharge witness from arrest, 381. ARREST, II. 1.

## II. Proceeding by affidavit of debt and surety bond.

Bond, how cancelled on render of principal.

Where a party under stat. 1 & 2 Vict. c. 110, s. 8, had made affidavit of debt against H. in the Bankruptcy Court, and H. had entered into a bond, with sureties, conditioned to pay such sum as should be recovered against him in an action on the debt, or to render himself, this Court held that it had no power on application by the sureties, suggesting that H. had rendered, to order the bond to be delivered up to be cancelled. *Hayward v. Heffer*, 398.

## III. Fiat.

Evidence of Master's authority to issue.

Stat. 1 & 2 W. 4, c. 56, s. 12, empowers a Master in Chancery, "acting under any appointment by the Lord Chancellor to be given for that purpose," to issue a fiat in bankruptcy. A fiat, purporting to be issued by a Master in virtue of authority given by the Lord Chancellor, was proved to have been actually issued by a Master who had often issued similar fiats.

*Held* sufficient evidence of Master's jurisdiction to issue the fiat, without specific proof of any authority given him by the Lord Chancellor.

If a party contemplating bankruptcy voluntarily makes a payment by which the equal distribution of his property under the fiat will be defeated, such payment is a fraudulent preference, though the bankrupt, in making it, did not intend to benefit, nor did in fact benefit, the particular creditor.

As if he pays off a mortgage on property settled to the use of his wife, (who had joined in such mortgage,) without previous notice to, or request by, the creditor, to whom it would have been equally beneficial to retain the mortgage; the bankrupt intending only, by such payment, to liberate the wife's property for his own and her benefit. *Marshall v. Lamb*, 115.

## IV. Act of bankruptcy: fraudulent preference.

1. Though creditor not benefited, 115. *Antè*, II.

2. Paying off a mortgage, 115. *Antè*, III.

## V. Bankruptcy of partnership firm.

After seizure of partnership effects under execution against one, 408. PARTNER, IV. 1.

## VI. Official assignee.

Omission to pay moneys into Bank of England; suggestion of breaches, 322. BOND, II. 1.

## VII. Assignees: rights of as to bankrupt's property.

1. Of uncertificated bankrupt, 965. POST, XI. 1.

2. Where 15s. in the pound not paid under second bankruptcy, 965. POST, XI. 1.

3. Time and manner of vesting, 965.

Post, XI. 1.

VIII. Witnesses.

Privilege from arrest: trespass or case, 381.

ARREST, II. 1.

IX. Warrant of commitment.

Must show jurisdiction, and how the party may clear himself.

A warrant of commitment by the Court of Review, made in the matter of E., a bankrupt, after reciting that by an order of the same Court therein on the petition of E., it was ordered that W. G. should stand committed to the Fleet, *for his contempt in the said petition mentioned*, and that a warrant should issue for that purpose, required the warden of the Fleet to take W. G. and convey him to the Fleet, *there to remain until the further order of the Court*. The previous order stated a petition to have been preferred by E., that W. G. might stand committed "for his contempt of the order in the said petition mentioned," but specified nothing further as to the contempt. *Held*, that the warrant and order were bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself.

In an action of trespass against the petitioner's attorney for falsely and maliciously imprisoning plaintiff; plea Not Guilty; the plaintiff proved that defendant had endorsed his name and address on the warrant sued out for the petitioner, on which plaintiff was committed. *Held* sufficient evidence to support a verdict for plaintiff on such plea.

An attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad. And, although (*semble*) the act of the attorney in handing over the warrant for execution might be so divested of any further proof of concurrence on his part that he would not be liable, he is so liable if his conduct in or after the performance of such act shows a motive beyond the mere wish to discharge professional duty; as if, after the commitment, he has improperly delayed giving information as to costs, which was required by parties wishing to pay such costs, and thereby to purge the contempt.

Where one of two defendants in trespass is acquitted, and a verdict passes against the other; *Semble*, per Lord Denman, C. J., that the latter may move for a new trial without the concurrence of his co-defendant. *Green v. Elgie*, 99.

X. Bankrupt.

1. Discharge from debts: promise after the bankruptcy.

Signature: order of time.

On an issue whether defendant, a certificated bankrupt, had given a written promise signed by him after his bankruptcy, so as, under stat. 6 G. 4, c. 16, s. 131, to revive a

claim barred by the certificate, the following letter was produced, written by him. "Mr. Stanley begs to inform" the plaintiffs "that he will take an early opportunity of settling their account: but Mr. Stanley objects to give his bill; Mr. Stanley regrets that he has been prevented from answering" the plaintiff's "letter before. Crescent, Saturday." Evidence of the amount due was given.

1. *Held*, that the letter was sufficiently signed.

3. Admitted, that parol evidence might be given of the time at which it was written.

3. *Held* a sufficient promise, notice having been given to the defendant to produce the letter of the plaintiffs referred to, which had not been done.

Though two other letters, written by defendant about the same time, were produced by the plaintiffs, in one of which defendant, referring to some request of plaintiffs, promised to discharge plaintiff's account as soon as he could, and in the other said he would give a promissory note; and it did not appear in what order of time the three were written. *Lobb v. Stanley*, 574.

2. Parol evidence, 574. *Antè*, 1.

XI. Bankrupt: after acquired property.

1. By uncertificated bankrupt.

Under stat. 6 G. 4, c. 16, ss. 63, 127, and stat. 1 & 2 W. 4, c. 56, s. 25, an uncertificated bankrupt may acquire property, and contract, for the benefit of his assignees, and may sue in respect of such property or contract. And a plea showing the bankruptcy, &c., constitutes no defence, unless there be an allegation that the assignees have interfered. The same is true in the case of a party who has twice been bankrupt and obtained his certificate, but has not paid 15s. in the pound, in respect of property acquired since the certificate. *Held* by the Court of Exchequer Chamber, reversing the judgment of the Court of Q. B.

By the Court of Q. B.; *De injuriâ* may be replied, in an action by the endorsee of a bill of exchange against the acceptor, to a plea that the bill was accepted for the accommodation of the drawer, to be deposited with R. as a collateral security for a debt from the drawer to R.; that R. took it on those terms; that the drawer, before maturity, paid R. part of such debt, and tendered the residue, which R. refused to accept; and that R. afterwards endorsed the bill to plaintiff, in order that plaintiff conspiring and colluding with R. to defraud defendant, might recover as a trustee for R.; such plea being in excuse and not in discharge. *Herbert v. Sager*, 965.

2. After second bankruptcy, 965. *Antè*, 1.

3. Interference of assignees, 965. *Antè*, 1.

XII. Bankrupt: uncertificated, 965. *Antè*, XI. 1.

**XIII. Pleading.**

1. That plaintiff is an uncertificated bankrupt, 965. *Antè*, XI. 1.
2. That plaintiff has been bankrupt twice and has not paid 15s. in the pound, 965. *Antè*, XI. 1.

**BARON AND FEME.**

- I. Separation by order of removal: consent, 916. *Poon*, XV.
- II. Fraudulent preference by husband paying of mortgage on wife's estate, 115. *BANKRUPT*, III.
- III. Disabilities as to wife's property. Lease by wife to husband, when invalid, 423. *POWER*, II.
- IV. Liabilities of wife.
  1. Attachment for non-payment of costs, 335. *COSTS*, VIII.
  2. Costs of proceedings in a suit instituted by her, 335. *COSTS*, VIII.

**BASTARD.**

- Under 4 & 5 W. 4, c. 76, s. 73, and 2 & 3 Vict. c. 85.  
Order for costs of opposing application, 71, 342. *Poon*, XXVIII.

**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

- I. Drawee.  
How affected by release of drawer, 247. *Post*, II. 3.
- II. Acceptance: Liability of acceptor.
  1. By one partner in fraud of the firm, 185. *Post*, X. 4.
  2. Payable at a particular place, 86. *Post*, X. 3.
  3. By partner in England of bill drawn on him by the firm abroad, and after a release abroad of the drawers.  
Assumpsit. 1st count on a bill of exchange for 359/., drawn at Rio de Janeiro, by Steele and Manton, on defendant, Manton, payable to plaintiffs, and accepted by defendant. 2d count on an account stated.  
Plea, as to the first count and 359/., parcel of the moneys mentioned in the second count, identifying the latter sum with the sum specified in the bill, and stating: That defendant and A. Steele were partners in London, under the name, &c., of Manton, Steele & Co., and at Rio, in the Brazil, under the name, &c., of Steele and Manton, defendant residing and carrying on the business in England, and Steele at Rio. That the bill was drawn and endorsed to plaintiffs at Rio by Steele, in the name of Steele and Manton, for a joint debt of defendant and Steele, incurred at Rio; and was drawn upon, and accepted by, defendant in the name of the London house. That after the drawing and endorsing, and before the acceptance, defendant and Steele, at Rio, being indebted to plaintiffs in the above sum, and

to other persons in divers other sums, he came embarrassed, &c.; and it was doubtful whether they would be able to pay in full; and thereupon, before the acceptance, &c., and while Steele was resident at Rio, the plaintiffs and the said other creditors, at Rio, of Steele and Manton agreed among themselves, in writing, that a liquidation of the debts of Steele and Manton should be forthwith commenced under the superintendence of Steele and others, and continued until the claims of plaintiffs and the said other creditors were paid in full, or liquidated to the extent of Steele and Manton's assets; that the holders of bills drawn by the Rio house upon the London house should be considered creditors for cash, but that their dividends should be retained till the protest of the London bills for non-payment, and should be divided among the creditors if those bills were paid; and that, if plaintiffs and the other creditors should be paid in full, the liquidation should cease.

The plea then stated an agreement by Steele and Manton with plaintiffs and the other creditors, that the liquidation, &c., should take place as above stated; and it averred that afterwards, and before the acceptance, &c., the firm of Steele and Manton, by Steele, proceeded, and were, until the commencement of this suit, proceeding, to realize the effects of Steele and Manton for the purposes of the agreement. The defendant accepted the bill after the making of the agreement, being at the time resident in England, and ignorant of the premises stated to have taken place at Rio. That all the proceedings at Rio were according to the law of the Brazil, and that, by that law, the agreement and promises aforesaid were a full and absolute discharge and release of the said debt in respect of which the bill of exchange was endorsed, and defendant is, and was, before action brought, absolutely discharged from the said cause of action in the first count mentioned, and from the cause of action mentioned in the second count as to the 359/.

**Replication. De injuriâ.**

*Held*, on demurrer to the replication:

1. That the plea, as to both causes of action, was in discharge, not in excuse, and therefore the replication, even if divisible, was bad.
2. As to the first count, that the plea, if it alleged a release of the drawers before acceptance, was bad for that reason.
3. As to the same count, that a release of the drawers, under the circumstances detailed in the plea, would be no defence to the drawers.
4. *Semble*, that the plea might have been an answer to the second count, if pleaded to that only. But

5 *Held* that, being pleaded to both, it was wholly bad. *Hartley v. Manton*, 247.

IV. What is a promissory note.  
Consideration.

A note was made in the following form: "On demand, I promise to pay W. S. 50l., in consideration of foregoing and forbearing an action in the Queen's Bench for damages ascertained by consent to amount to that sum by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway."

*Held*, that the instrument appeared to be made on an executed consideration, and was a valid promissory note. *Shenton v. James*, 199.

V. Transfer by endorsement.

1. What is an endorsement, 81. Post, X. 6.

2. What is an endorsement; joint consideration.

Assumpsit on a bill of exchange, alleged to be endorsed by defendant to plaintiff.

Plea, that the bill was endorsed by defendant in blank, and by him delivered to C. for the special purpose that C. should get it discounted for defendant, and for no other purpose; that defendant received no consideration from C.; that C. got the bill discounted by plaintiff and W. jointly, who delivered the money, being their joint money, to C., as the consideration for the delivery of the bill to them by C.; that C. delivered the bill to them jointly, and not to plaintiff solely, or with the intention of giving him a separate right of action; that defendant received no consideration from plaintiff solely; and that the only consideration received by defendant and C., or either of them, was the said joint discount.

*Held* bad, on general demurrer. *Wood v. Connop*, 292.

3. Fraudulent endorsement by depository, 965. BANKRUPT, XI. 1.

4. Endorsee when not bound to prove the circumstances, 185. Post, X. 4.

VI. Transfer by delivery for specific purpose.

Condition of *bonâ fide* holder, 81. Post, X. 6. 292. Antè, V. 2.

VII. Holder.

1. Condition of *bonâ fide* holder after fraud by previous endorser, 81. Post, X. 6.

2. Where one of several partners has accepted in fraud of the firm, 185. Post, X. 4.

VIII. Payment and satisfaction.

By another note with an additional party, 440. Post, X. 8.

IX. Release.

Of drawer before acceptance, 247. Antè, II. 3.

X. Pleading and evidence.

1. Pleading according to legal effect, 86. Post, 3.

2. Plea to count on bill, and also to count

on account stated, bad as to one, is wholly bad, 217. Antè, II. 3.

3. Special acceptance: allegation of presentment.

Since stat. 1 & 2 G. 4, c. 78, if the drawee of a bill drawn without special direction as to place of payment accepts it, payable at a particular place, (without any additional words,) he undertakes thereby to pay the bill at maturity, when presented at that place, or to himself: if he accepts, payable at such place, "and not otherwise or elsewhere," he undertakes to pay it at maturity, if presented at that place, but not otherwise.

And, if a declaration by endorsee against acceptor of such a bill states that he accepted it "payable at C. and Co, bankers," and that the defendant promised to pay it "according to the tenor of and effect thereof," it will be understood that the bill is pleaded according to its legal effect; but that does not imply that the bill is made payable at the banker's only; and therefore the declaration need not state a presentment there. *Halstead v. Skelton*, 86.

4. Traverse of acceptance.

In an action by endorsee against acceptors of a bill of exchange, some of the defendants pleaded that they did not accept. It was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes.

*Held*, that such proof, without evidence of knowledge on the part of the plaintiff, did not, under this issue, oblige plaintiff to prove the circumstances under which the bill was endorsed to him. *Musgrave v. Drake*, 185.

5. Endorsement to one for joint consideration, 292. Antè, V. 2.

6. Traverse of endorsement.

In an action against the acceptor of a bill of exchange endorsed by A., the drawer and payee, to B., B. to C., and C. to plaintiff, who appears to be a *bonâ fide* holder, the defendant, on a plea that A. did not endorse to B., cannot offer evidence that A. delivered the bill to B. for a specific purpose, and not to be negotiated, and that B. fraudulently negotiated it. *Hayes v. Caulfield*, 81.

7. Release of drawer, a plea in discharge, 267. Antè, II. 3.

8. Acceptance of another note in satisfaction.

To an action on a promissory note, defendant pleaded that the holder accepted another note, with an additional party, in satisfaction of the first. It appeared in evidence that this other note had been given and accepted in satisfaction, not of the note declared on, but of an intermediate note

which had been given, without the additional party, in satisfaction of the note declared on.

*Held*, a variance: and that the judge at Nisi Prius had no power to amend the plea by substituting a description of the intermediate note. *David v. Preece*, 440.

9. De injuria, a bad replication to plea of release of drawers, 247. *Ante*, II. 3.

10. De injuria, a good replication to plea of fraudulent negotiation by depository, 965, *BANKRUPT*, XI. 1.

### BOND.

#### I. Bail-bond.

Cancelling on render of principal, 398.

*BANKRUPT*, II.

#### II. Debt on.

1. Assignment or suggestion of breaches: judgment by default.

In a case where breaches must be assigned or suggested under stat. 8 & 9 W. 3, c. 11, s. 8, if the defendant does not rejoin, the ordinary course is for the plaintiff to sign judgment for want of a plea, strike out all the pleadings subsequent to the declaration, and suggest breaches, if the declaration itself does not state them. But this is only a rule of convenience; and, if the nature of the case requires that the pleadings, down to the default, should continue on the record, they ought to be retained;

Therefore, where to debt on bond conditioned to perform certain duties the defendant pleaded, generally, performance of the condition, plaintiff replied, alleging breaches, by not performing some of the duties, defendant suffered judgment by default, and plaintiff sued out a writ of inquiry, setting forth on the writ all the pleading down to the end of the replication;

*Held*, that the course pursued was right, and that a statement of breaches appeared, of which the court, executing the inquiry, might properly take notice.

The Lord Chancellor, under stat. 1 & 2 W. 4, c. 56, made an order that each official assignee of the Court of Bankruptcy should pay into the Bank of England "all such sums of money as should come to his hands, as soon as they should amount to 100*l.*," and should state in writing, among other things, "the name and description of the bankrupt or bankrupts to whose estate the money belonged."

*Held*, that it was well assigned, as a breach of this order by an assignee, that he, as such, received divers sums on account of divers estates of bankrupts, amounting in the whole to a sum over and above 100*l.*, to wit, &c., and did not pay them in, &c. *Lewis v. Shaw*, 322.

1. Official assignee's surety bond: breach,

non-payment of money into Bank of England, 322. *Ante*, I.

### BREACH.

Assignment and suggestion, 322. *BOND*, II. 1.

### BRIDGE.

#### I. Liability to repair.

Immemorial public bridge enlarged within time of memory, 187. *EVIDENCE*, IX. 1.

#### II. Pleading and evidence.

1. What description of bridge not a variance from allegation of immemorial bridge, 187. *EVIDENCE*, IX. 1.

2. Declaration of parish officers and rateable inhabitants, 187. *EVIDENCE*, IX. 1.

### CANCELLATION.

Of surety bond on render of principal, 398. *BANKRUPT*, II.

### CAPIAS.

I. By judge's order under stat. 1 & 2 Vict. c. 110, s. 3. 551. *ARREST*, I.

II. Ad satisfaciendum. *EXECUTION*, I. IV. V.

### CAPTION.

I. Of order of sessions, 163. *CERTIORARI*, VII. 1.

II. Of examinations, 916. *POOR*, XV.

### CARRIER.

I. Action on settlement of accounts between joint carriers, 128. *PARTNER*, III. 1.

II. Liability for negligence.

Prima facie evidence of negligence in railway company, 747. *RAILWAY*, I.

### CASE.

When not the proper remedy for malicious omission to discharge a prisoner, 381. *ARREST*, II. 8.

### CENTRAL CRIMINAL COURT.

Statement of venue, 37, 34. *INDICTMENT*, II. 4, 5.

### CERTIFICATE.

For speedy execution, 602. *EXECUTION*, I. 1.

### CERTIORARI.

#### I. Generally.

Who is prosecutor, 959. *Post*, IX.

#### II. Affidavits for.

What service of notice they must show, 201, 207. *Post*, IV. 2.

#### III. Removal of indictment by.

1. What venue shows jurisdiction to try, 37. *INDICTMENT*, II. 4.

2. What does not, 44. *INDICTMENT*, II. 5.

3. What conditions shall be imposed, 44. *INDICTMENT*, II. 5.

#### IV. Removal of orders of justices by.

1. Notice, on whom it must be served.

When the quarter sessions have granted

a case, notice of the motion for a certiorari to bring up the orders must, (by stat. 13 G. 2, c. 18, s. 5,) be served on two or more justices who were actually present at the sessions.

And, if the certiorari has issued on an affidavit showing that the notice was served on persons described in the affidavit as justices of the county, &c., for which the sessions were held, but not stated to have been at the sessions when the order was made, the writ will be quashed.

The court will not presume that every justice qualified to attend the quarter sessions, was actually present there when any particular order was made.

On motion to quash the certiorari for the reason above stated, mere lapse of time, however long, since the writ issued, is no answer. *Regina v. Cartworth*, 201.

2. Notice, on whom it must be served.

On motion to quash a certiorari removing an order of the Yorkshire East Riding Quarter Sessions, it appeared that the writ was granted on affidavit that notice had been served (under stat. 13 G. 2, c. 18, s. 5) on B. and F., who were stated in the affidavits to be justices of the Riding, but were not sworn to have been present when the order was made.

*Held*, that the affidavits did not warrant the writ, and that the defect was not cured by affidavits exhibited on showing cause, more than six calendar months after the order of sessions, that B. and F. were justices present at the making of the order.

Writ quashed. *Regina v. Gilberdike*, 207.

3. When quashed for defect in affidavits, 201, 207. *Antè*, 1, 2.

4. Though a special case granted, 201. *Antè*, 1.

V. To remove proceedings before commissioners of sewers, 357. *SEWERS*, I.

VI. To remove orders of town council, 959. *Post*, IX.

VII. Return.

1. Required to be amended by sending up recognisances.

Parish officers applied at petty sessions for an order upon H. for maintenance of a bastard. H. desired a hearing at quarter sessions, and gave recognisances to appear, &c., and pay costs if adjudged the putative father. The quarter sessions dismissed the application, and ordered the parish officers to pay costs to H. The order, as returned on certiorari, contained a statement of the recognisances, but they were not sent up. This court, on motion, directed the return to be amended by the recognisances being sent up.

The order of sessions, as signed by the clerk of the peace, and served on the parish officers, appeared to be made at quarter ses-

sions holden by adjournment, but did not show the date of the original quarter sessions.

When, however, the order was returned to the certiorari, the date of the original holding was shown by the caption. This court refused to order the return to be amended by making it correspond in the above respect with the order as served. *Regina v. Ardsley*, 163.

2. Refusal of amendment by making order returned correspond with order served, 163. *Antè*, 1.

3. What not a variance in description of documents, 912. *POOR*, XXI. 2.

VIII. Quashing, 201, 207. *Antè*, IV. 1, 2.

IX. Costs.

Rule for, must show who is to pay.

When an order, brought up by certiorari, is quashed on motion, with costs, the court should decide who is to be charged with costs as prosecutor of the order, and the party should be named in the rule.

Therefore, where orders for payment of money out of borough funds were so brought up, (under stat. 7 W. 4, & 1 Vict. c. 78, s. 44,) and quashed, the rule not stating by whom the costs were to be paid, and no cause having been shown, the court refused to grant an attachment against individuals, A., B., and C., for non-payment, though the rule for an attachment was drawn up on reading affidavits sworn by A., B., and C., and used in opposing the motion for a certiorari, and showed, as the parties applying for an attachment contended, that A., B., and C. were the persons who prosecuted the orders since quashed, by supporting them in this court. *Regina v. Dunn*, 959.

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## CHARGEABILITY.

Of poor. *POOR*, XIV.

## CHARTER-PARTY.

I. Avoidance by delay.

By charter-party between plaintiff, owner of a ship, and defendants, it was agreed that the ship should load from defendant's agent at Nantes a full cargo, and, being loaded, forthwith proceed to London, and deliver the cargo on being paid freight upon unloading and delivery, twenty-five running days being allowed for loading and discharging at Nantes and London, with penalty for demurrage beyond.

A declaration in assumpsit set out the charter-party, and averred that the vessel arrived at Nantes, whereof defendants' agent there had notice; that the ship was ready to load the cargo, and defendants' agent was requested, during the running days, to load

it, and plaintiff was ready to detain the ship on demurrage over those days: but defendants refused to load.

Plea that, after the making the charter-party, and before proceeding to Nantes, the vessel proceeded to Newcastle, contrary to the intent of the charter-party, and, by reason thereof, arrived at Nantes a long and unreasonable time after the time at which she would have arrived at Nantes, had she sailed directly according to the intent of the charter-party.

*Held* bad, on demurrer, for not showing that the delay frustrated the object of the voyage. *Clipsrum v. Vertue*, 265.

II. Pleading, 265. *Antè*, I.

### CHILD.

BASTARD. PARENT AND CHILD.

### CHURCH RATE.

I. Refusal to join in making.

When not an offence cognisable by Ecclesiastical Court.

A citation, stating only, as the matter of charge, that the party cited, being a parishioner of G., "wilfully and contumaciously obstructed, or at least refused to make or join in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church," does not show an offence cognisable by the Ecclesiastical Court.

To a citation framed as above, the parishioner appeared under protest. The judge of the Ecclesiastical Court overruled the protest, and ordered the party to appear absolutely. He thereupon declared in prohibition, setting forth the citation and the other proceedings. On demurrer to the declaration,

*Held*, that the declaration was good, the citation being insufficient to give jurisdiction.

And that the suit in prohibition was not premature. *Francis v. Steward*, 984.

II. Citation, 984. *Antè*, I.

III. Prohibition, 984. *Antè*, I.

### CHURCHWARDEN.

Effect of his being also overseer of the poor, 640. *POOR*, XXIV. 2.

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Page 984. *CHURCH-RATE*, I.

### CLAY.

Prescription to dig in alieno solo, 415. *PRESCRIPTION*, III. 3.

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I. Attorney's, 447, 564. *ATTORNEY*, I. 1, 2.

II. Justice's, 402, 862. *STATUTE*, XLI. 3, 5.

III. Parish, 614. *OFFICE*, VII.

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Construction of agreement of hiring and service. *MASTER AND SERVANT*, I. 1.

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I. Of sewers, 357. *SEWERS*, I.

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Indefinite claim unreasonable, 415. *PRESCRIPTION*, III. 3.

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III. Recovery back, 432. *ANNUITY*, II. 1.

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1. For receipt of port dues, 773. *PORT*, I. 1.

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Joint consideration for several endorsement, 292. *BILLS*, V. 2.

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- I. Rules of.
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  5. "Chargeable," 591. POOR, XI. 1.
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  11. "Issue or issues tried," 335. COSTS, VIII.
  12. "Jurisdiction," 16. INDICTMENT, II. 1.
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  2. Effect of proving the overt acts where there is failure of proof of the conspiracy, 447. ATTORNEY, I. 1.
- II. Indictment.
  1. To obtain money by false pretences: statement of means.

An indictment charged that A. and B. conspired, by false pretences and subtle means and devices, to obtain from F. divers large sums of money, of the moneys of F., and to cheat and defraud him thereof. The

means of the alleged conspiracy were not stated, except as above.

*Held* sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that horses were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them.

A false pretence, knowingly made to obtain money, is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make.

A. and B. having pleaded not guilty to an indictment for conspiracy, B. died between the venire and distringas. A. was tried alone, and found guilty. *Held* not a mistrial.

Admitted, that an indictment for false pretences must state whose money, &c. it was intended to obtain by the pretence. *Regina v. Kenrick*, 49.

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Under stats. 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, 66. POOR, XXIX.
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- II. Consideration.
  1. Failure, 233. PATENT, I. 432. ANNUITY, II. 1.
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  1. The Court will not imply terms merely

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#### IV. Avoidance.

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Costs of setting aside, 335. **COSTS**, VIII.

### CONVEYANCE.

By wife to husband invalid, 423. **POWER**, II.

### CONVICTION.

#### I. What it must show.

Evidence given in presence of defendant.

A summary conviction is bad which does not show that the evidence was given in the presence of the party charged.

The same rule applies to warrants of commitment which operate in themselves as convictions; as a committal, under the Artificers' Act, 4 G. 4, c. 34, s. 3, of a workman absenting himself from his service.

A committal of T., under the above clause, sets forth that "information and complaint hath been made before me" (the justice), "by F." "upon the oath of F." "for that," &c. (stating the charge): "and whereas the said T., in pursuance of my warrant for that purpose, hath *this day* appeared before me to answer the said complaint, *but hath not proved that he is not guilty of the said complaint and charge*: and whereas, in pursuance of the statute in that case" &c., "I have duly examined the proofs and allegations upon oath of both the said parties touching the matter of the said complaint; and, upon due consideration had thereof, *have adjudged and determined* the said complaint to be true, and that," &c. (affirming the charge): "and *I do therefore convict* him, the said T., of the said offence, in pursuance of the statutes in that case," &c.: "these are therefore to command you," (the constable,) &c.

The above warrant being alone returned to a habeas corpus ad subjiciendum, *Held*,

(1) That it did not show that the evidence was given in the presence of T.

(2) That the court could not assume that there was a distinct conviction, free from the objection.

Prisoner discharged. *Regina v. Tordoft*, 933.

2. What words do not show the evidence to have been taken in the defendant's presence, 933. *Antè*, 1.

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Jurisdiction as to place.

Place of finding and of view in different jurisdictions.

If a person is found drowned in a river within the concurrent jurisdiction (exclusive of all others) of the coroner for the city, and the admiralty, and the body is taken to a place on shore beyond the city limits, the coroner and jury of the city cannot view the body at such place for the purpose of an inquest; and an inquisition taken on such view will be quashed.

So held on an inquisition taken after stat. 6 & 7 Vict. c. 12. *Regina v. Hinde*, 944.

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When not applicable, 337. *Post*, II.

#### II. After judgment on demurrer.

Plaintiff's costs not reduced by statute.

Where plaintiff in trespass obtains judgment on demurrer, and a writ of inquiry is executed, he is entitled to costs of suit, under stat. 3 & 4 W. 4, c. 42, s. 34, though the verdict be only for one farthing damages, and the judge do not certify; stat. 3 & 4 Vict. c. 24, s. 2, being inapplicable to such a case. *Taylor v. Rolf*, 337.

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2. Of application in bastardy, 71, 342. **POOR**, XXVIII. 1, 2.

3. Of defence of borough constable, 477. **STATUTE**, XLI. 4.

4. Of proceedings before borough justices, when chargeable on borough fund, 362. **STATUTE**, XLI. 5.

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Against respondent parish procuring justices to make return to a mandamus, 1. **POOR, XXVI. 1.**
- VIII. Against feme covert.**  
A married woman prosecuted another married woman in the Ecclesiastical Court: and the defendant was committed under a writ de contumace capiendo for non-payment of costs. This court, on a defect in the writ, set it aside, and ordered the prosecutor to pay the costs, the defendant and her husband undertaking to bring no action. The costs having been taxed, and not paid by the prosecutrix on demand, this court granted an attachment against the prosecutrix, absolute in the first instance. *Regina v. Johnson*, 335.
- IX. Ascertainment of.**
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- X. Taxation on reduced scale.**  
Country cause.  
The scale of taxation in the *Directions to taxing officers*, Hil. Vac. 4 W. 4, for causes where the sum recovered does not exceed 20*l.*, applies, with respect to all the items not expressly distinguished, to country causes as well as to town causes. *Gibbs v. Watley*, 396.

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- For words imputing malversation in office, when refused.  
The court will not grant a criminal information for unwritten words imputing to a justice malversation in his office, if the words neither were spoken at the time when the justice was acting, nor tended to a breach of the peace. *Marlborough, Duke of, Ex parte*, 955.

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  1. To create in alieno solo, 773. **PORT, I. 1.**
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Right to undermine houses in working coal-mines, 701. **PRESCRIPTION**, III. 1.

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I. Power of crown to grant petty custom dues, 773. **PORT**, I. 1.

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1. Attorney-general's authority to prosecute when necessary.

Stat. 3 & 4 W. 4, c. 53, s. 112, enacts, that no indictment shall be preferred or suit commenced for the recovery of any penalty or forfeiture under that or any other act relating to the customs, unless the suit be commenced in the name of the Attorney-General, or the Lord Advocate, or the indictment be preferred under the direction of the Commissioners of Customs, or the suit be commenced in the name of some officer of customs, under the direction of the Commissioners. Sect. 113 enacts that, if any prosecution be commenced for the recovery of any fine, penalty, or forfeiture incurred under any act relating to the customs, the Attorney-General or Lord Advocate may stop the proceedings by entering a nolle prosequi or otherwise, on such information. Stat. 3 & 4 W. 4, c. 51, s. 29 enacts that, on inquiry as to facts relative to the customs, &c., before a Surveyor-General, evidence shall be given on oath, and, if false, shall be an act of perjury.

On indictment for perjury so committed,

1. *Quare*, whether the indictment need be authorized, as directed by stat. 3 & 4 W. 4, c. 53, s. 112.
2. If it need, *quare*, whether the indictment ought, on the face of it, to show the fact of the authority.

But at any rate this court will not quash an indictment not showing the authority, though the want of it appear by affidavit; but will leave the defendant to his demurrer, or motion in arrest of judgment, or application to the attorney-general.

Per Lord Denman, C. J., sect. 113, of stat. 3 & 4 W. 4, c. 53, does not apply to such indictments; but, with respect to them, the attorney-general is left to his common law power. *Regina v. Burnby*, 348.

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Right to copies: signature.  
A party charged before a magistrate with  
an offence, is entitled to copies of the depo-  
sitions under stat. 6 & 7 W. 4, c. 114, s. 3,  
when he is finally committed or held to bail  
for the purpose of trial; but not on his be-  
ing remanded for further examination.  
A magistrate committing for re-examina-  
tion, ought at each examination to subscribe  
the depositions then taken, (the witnesses  
having first signed,) and not to defer the  
subscription by himself and the witnesses  
till he determines upon committing. *Regina*  
*v. London, Lord Mayor*, 555.

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Vested remainder liable to open and let in  
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S., being seised in fee of lands, devised  
them to her two grandsons T. and W., dur-  
ing their natural lives, in equal moieties, and,  
after their decease, the moiety of T. "to  
such children as he shall happen to leave,  
lawful issue, at the time of his decease, and  
to their, her, or his heirs and assigns for  
ever, to take in equal shares, if more than  
one:" with a similar limitation as to W.'s  
moiety. In case either T. or W. should  
"happen to depart this life without lawful  
issue," S. gave the moiety of the grandson  
so departing to the survivor, and to her other  
grandson J., during their lives, "and, after  
their decease, the same to go to their lawful  
issue in equal moieties and shares, and to  
their, such lawful issue's heirs and assigns  
for ever:" and, in case it should happen  
that both T. and W. should depart this life,  
and neither of them should have any lawful  
issue, S. gave the whole to J. for life, and,  
after his decease, to such child or children as  
he shall leave, lawful issue, at the time of  
his decease, and to their, his, or her heirs and  
assigns for ever, to take in equal shares, if  
more than one." In case it should happen  
that all three, T., W., and J., "shall depart  
this life without lawful issue, or if they  
or any of them shall leave lawful issue, and  
such issue shall depart this life under the  
age of twenty-one years and without lawful  
issue," then S. gave the whole to her sisters  
E. and A., and their heirs and assigns for  
ever, as tenants in common.

T. and W., the grandsons, both survived  
S. After S.'s death, and before the death  
of T. or W., a daughter of T. was born,  
who survived him. After her birth T. and  
W. suffered a recovery.

*Held*, that the daughter, on her birth, took  
a vested remainder, liable only to open and  
let in the interests of after-born children,  
which remainder was not therefore barred  
by the recovery. *Doe dem. Bills v. Hopkin-*  
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Per Lord Denman, C. J. If such inhabitants are surveyors of highways, and, on inquiry by the attorney for the prosecution, have given details as to the liability and practice of the township in respect of repairs, their statements are admissible as the communications of authorized official agents.

An indictment charged that there was in township A., an immemorial public bridge, and that the inhabitants of A. had been used, &amp;c., from time whereof, &amp;c., to repair the said bridge. Plea Not guilty. On the trial it appeared that the inhabitants had repaired an immemorial public bridge; but that, in one year, within memory, they had widened the roadway of the bridge from nine to sixteen feet. Held that, whether the added part were repairable by the township or not, there was no variance between the indictment and the evidence.

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So held where the certificate was given, March 13th, and the Master had declined to endorse his allocatur for costs; and delivered it so endorsed, before the fifth day of Easter term. *Smith v. Dickenson*, 602.

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Declaration, in case, against sheriff, recited a judgment recovered by plaintiff against B., and a *fi. fa.* thereon, delivered to defendant; and that goods of B. were within defendant's bailiwick, whereof defendant could have levied, of which he had notice: breach, that defendant had not the moneys before, &c., according to the exigency of the writ, nor paid them to plaintiff, nor levied the moneys, and falsely returned that he had seized goods of B., the value whereof was unknown to him, and which remained unsold for want of buyers.

Plea: that defendant seized a bed, &c., and divers other goods of B.; that plaintiff directed defendant to withdraw from the possession of all the goods except the bed, &c.; whereupon defendant did withdraw from possession of all the goods, except the bed, &c.; that he was unable to find buyers for the bed, &c.; and that the value of the bed, &c. was unknown to him; and the plea justified the breaches accordingly.

Replication, traversing the inability to find buyers, and new assigning that the action was brought, not for not levying of the goods from possession of which defendant withdrew, but, as well for not levying of the bed, &c., as also because, although there were goods of B., being part of those mentioned in the declaration and other than those alleged in the plea to have been seized, of which defendant could have levied, whereof defendant had notice, yet defendant did not levy of the goods newly assigned, and falsely returned as in the declaration mentioned.

Plaintiff joined issue on the traverse, and demurred to the new assignment. On argument of the demurrer,

Judgment for plaintiff, for the badness of the plea, as it did not allege that the goods seized were sufficient to satisfy the writ, or that there were no other goods which could be seized. *Pitcher v. King*, 758.

3. New assignment, 758. *Antè*, 2.

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Must show deposition on oath.

Under stat. 6 & 7 W. 4, c. 65, s. 9, an information under the Game Act, 1 & 2 W. 4, c. 32, if laid by a person not deposing on oath to the matter of charge, must distinctly show that the charge was deposed to by some other credible witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction; and, if the defendant is summoned and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury.

*Quære*, whether, under stat. 9 G. 4, c. 69, s. 9, or 1 & 2 W. 4, c. 32, s. 30, a party can be convicted of entering or being upon land for the purpose of poaching, if he does not himself go upon the land, but is on an adjacent close, employing, assisting, and in company with, those who actually enter. *Regina v. Scotton*, 493.

II. Entering upon land for the purpose of poaching.

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## GAMING.

I. On credit.

In all cases of games within stat. 16 C. 2, c. 7, s. 2. where the stake exceeded 100l. and was not paid down immediately, any contract for the payment was void by sect. 3.

Therefore where a declaration in assumpsit stated that a race called the Grand Duke Michael Stakes was annually run at the first October meeting at Newmarket, between horses named by persons subscribing to the stakes on certain terms; that terms were declared for a race to be so run in 1842, for stakes of 50l. for each horse named, to be subscribed to the said stakes by the namers of such horses respectively; that plaintiff, defendant, and others subscribed, and respectively named horses, defendant naming three; that the several parties mutually promised to observe the terms; that a horse named by plaintiff won the race; and that defendant thereby became liable to pay three sums of 50l. as and for the stakes in respect

of his horses, which sums, when paid, belonged to plaintiff as winner of the stakes; yet defendant disregarded his promise, &c.

*Held* that the declaration was bad on general demurrer as showing an illegal contract. *Bentlack v. Connop*, 693.

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Y. and S. were attorneys in partnership. S. gave an undertaking that, in consideration of the plaintiff in an action, giving the defendant in that action his discharge from custody, "we hereby agree" to pay such plaintiff the debt and costs on a day named. S. signed this, "Y. and S., defendant's attorneys," but afterwards struck out the words "defendant's attorneys." It was not proved that the defendant had employed the firm, but only that S. had been employed by him to wind up his affairs; nor was any evidence given of recognition or knowledge by Y., or of authority from him to S., by previous practice or otherwise, to give such a guarantee.

*Held*, that Y. was not liable on the guarantee. *Hasleham v. Young*, 833.

**HABEAS CORPUS.**

*Ad subjiendum.*

**I. Return of substituted warrant.**

The return to a habeas corpus stated that the prisoner was committed for three months by warrant of a justice, (set forth in the return,) reciting a conviction by the justice, on which the warrant purported to proceed, for an offence under stat. 4 G. 4, c. 34, s. 3. The recited conviction was, on the face of it, bad. The return then stated that, a week after such commitment, the prisoner being still in custody, the same justice delivered to the jailer another warrant of commitment

reciting, and grounded upon, a conviction of the same date as the first, by the same justice, setting forth the same offence, and imposing the same punishment. In this conviction no material defect appeared.

*Held*, that the prisoner was not entitled to be discharged, the return showing a good warrant under which he was in custody. *Regina v. Richards*, 926.

**II. Refusal to presume a good conviction distinct from the commitment, 933. CONVICTION, I. 1.**

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**II. Removal of obstructions.**

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**III. Liability to repair.**

**1. Cesser on destruction of the highway.**

On indictment (November, 1842) for non-repair of a highway, alleging liability *ratione tenuræ*, it appeared by special verdict: That defendant held lands adjoining the sea; that an ancient highway had passed over the said lands, and that, from time immemorial, except as after mentioned, defendant and those whose estate, &c. had restored and repaired so much of the way as passed over the said lands: that the sea had from time to time encroached upon the said highway, so that a portion of the land over which it went was covered by the sea and impassable, wherefore defendant and his predecessors had from time to time gradually removed the said highway, and appropriated other parts of the lands for the site thereof, so that the public had the uninterrupted use of it; and that the said road had always been repaired by defendant and his predecessors, as or in lieu of so much of the said ancient highway: that the portion of way now alleged to be out of repair was part of the said ancient highway so passing over the said lands and used by the public as aforesaid, though passing over a different part of such lands from that formerly occupied by the road and since by the sea: that, in March, 1842, (before the preferring of the indictment,) the sea encroached upon the part of the said road now complained of as out of repair, and rendered it ruinous, &c., as in the indictment stated, and that defendant has not restored the same, but a portion thereof has, ever since the said month of March, had the earth and soil washed away,

and is thereby made impassable: that the residue thereby became, and is, too narrow for passage, and now stands at the edge of a precipitous bank seventy feet deep, and forming an angle of forty-five degrees to the horizon; and that it would cost a very great sum of money to make a road over the space last occupied by the said highway.

*Held*, that defendant's liability had ceased; and, the Quarter Sessions having given judgment for the Crown upon the special verdict, this court reversed the judgment. *Regina v. Bamber*, 279.

2. Declarations of surveyors and rateable inhabitants, 187. EVIDENCE, IX. 1.

#### IV. Indictment for non-repair.

1. Under order of justices, 887. Post, 2.

2. Costs of prosecution: judge's order.

Where justices have directed an indictment against a parish, under stat. 5 & 6 W. 4, c. 50, s. 95, for non-repair of a highway, and the judge of assize directs payment of the costs out of the parish highway rate, he must ascertain the amount of costs, and order payment of the sum so ascertained. Where the judge's order is only to pay the costs generally, this court cannot enforce such an order by mandamus.

Whether the amount can be ascertained after the commission of the judge of assize has expired, *quære*. *Regina v. Clark*, 887.

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3. For non-repairs of highway, by order of special session, 667. HIGHWAY, IV. 2.

##### II. Venue.

1. Effect of total omission.

In an indictment for misdemeanor, a count containing no statement of venue, either by reference or otherwise, is bad at common law, after verdict, though a venue be stated as usual in the margin of the indictment.

And such defect is not aided by stat. 7 G. 4, c. 64, s. 20, because it does not appear by the indictment that the court had jurisdiction over the offence.

For the word "jurisdiction" there means local jurisdiction, and not jurisdiction with reference to the nature of the charge.

And the statement of venue in the margin implies only that the indictment is found by a grand jury of the county named, not (as in civil cases) that the complaint is laid as arising within the county.

*Semhle*, that a count in such indictment, charging, without any statement of venue, that certain persons unlawfully and tumultuously assembled, and committed certain other alleged offences, and then adding, with a statement of venue, that the defendants "did unlawfully aid, abet, assist, comfort, support, and encourage" the said persons to continue such unlawful assemblings and other offences, is bad at common law, after verdict, because a material fact (the misdemeanor alleged to have been committed by the first-mentioned persons) is laid without a proper assignment of venue.

But stat. 7 G. 4, c. 64, s. 20, cures this defect, because it consists only in the "want of a proper or perfect venue," and the court appears by the indictment to have had jurisdiction. *Regina v. O'Connor*, 16.

2. Effect of partial omission, 16. Antè, 1.

3. Effect of marginal venue, 16, 44. Antè, 1. Post, 5.

4. Where the trial is at Nisi Prius after removal by certiorari: sufficient reference to city of London.

An indictment for misdemeanor, found at the Central Criminal Court, had in the margin the words, "Central Criminal Court;" and stated that M. A., "late of the parish of St. Stephen, Coleman Street, in the City of London, and within the jurisdiction of the said court, labourer," intending, &c. on, &c., "at the parish aforesaid, and within the jurisdiction," &c., unlawfully, &c.;

alleging the offence without further statement of venue.

The indictment was removed by certiorari, and tried in London, and the defendant convicted. On motion in arrest of judgment:

*Semble*, that the venue assigned to the material fact appeared sufficiently to be in the city of London; and *Held*, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by stat. 7 G. 4, c. 64, s. 20; for that the indictment showed jurisdiction in the Court at Nisi Prius to try the case in London. *Regina v. Albert*, 37.

5. Where the trial is at Nisi Prius after removal by certiorari: total omission of reference to county.

An indictment was preferred in the Central Criminal Court, the venue in the margin being "Central Criminal Court, to wit," and the material facts being laid only as having taken place "within the jurisdiction of the said court." The defendant, having removed it by certiorari, was tried at Nisi Prius in Middlesex, and found guilty.

Judgment arrested, the description of place not being made sufficient, by stat. 4 & 5 W. 4, c. 36, s. 3, in cases not tried at the Central Criminal Court, and the defect not being cured by stat. 7 G. 4, c. 64, s. 20, the Nisi Prius Court not appearing "by the indictment" "to have had jurisdiction over the offence."

This court refused, after verdict, to enter a suggestion for a trial in Middlesex, *nunc, pro tunc*. And, *semble*, such an application would not be granted at any period.

An indictment preferred in the Central Criminal Court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And, if that has not been done, it should be made a condition of the removal by certiorari that defendant consent to the insertion. *Regina v. Stowell*, 44.

6. Statutory, when insufficient, 44. *Antè*, 5.

7. Defect in, when cured by verdict, 16, 37, 44. *Antè*, 1, 4, 5.

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1. What are.

In an action for goods sold and delivered, infancy was pleaded: replication, that the goods were necessaries, suitable to the estate and condition of the defendant. It appeared at Nisi Prius that defendant was resident as an undergraduate at Oxford; and that the goods consisted of articles supplied for dinner at his own rooms, (where he received parties of friends,) and for fruit, confectionary, &c. *Held*,

1. That, in default of explanation, the court would treat them as not necessaries.

2. That, in case of explanation respecting any of the articles, (as in the case of illness, where fruit, &c., was medically prescribed,) the question whether the articles were necessaries or not would be a mixed one of law and fact.

3. That the rank or fortune of the defendant might make some articles "necessaries," which, in the case of another person, must be deemed articles of mere comfort and convenience; but that articles which, in the particular case, are matters of comfort and convenience merely, can never be included under the term "necessaries."

4. That articles which might in some situations be necessaries might not be so to a defendant in statu pupillari at Oxford, where necessaries are, to a certain extent, supplied by the college. *Wharton v. McKinnzie*, 606.

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- Appointment of chaplain.

Stat. 2 & 3 Vict. c. 56, which, by sect. 15, provides that in every borough jail and house of correction a chaplain shall be appointed "by the same authority by which the keeper is appointed," makes no change in the power of appointment of the keeper, but leaves it in those who formerly exercised it, whether under the jail acts, or by particular franchise.

Queen Elizabeth granted to the corporation of Bath that they might elect two of themselves yearly to be bailiffs of the city, and that the corporation might have within the city a jail for the keeping of prisoners attached, committed, or adjudged to the prison for any matter which might or ought to

be inquired of in the said city: but persons arrested for offences not cognisable there were to be sent to the county jail: also that the bailiffs for the time being should be keepers of the city jail. She further granted that the mayor, recorder, and certain of the aldermen should be justices of the peace for the city, with power to correct certain offenders, to take sureties of the peace, or to commit if they were not found, and to try and determine of certain offences, (but not felonies,) in the same manner as county justices might. She also granted them a court of record for the trial of personal actions: and the bailiffs had the execution of warrants under such court. Until the passing of stat. 5 & 6 W. 4, c. 76, the corporation annually elected such bailiffs, who had the care and keeping of the jail, and appointed a jailer under them. The corporation was continued by stat. 5 & 6 W. 4, c. 76; and the boundaries of the borough were extended; after which a bailiff was elected annually, and acted with regard to the jail as the bailiffs formerly did. The new corporation obtained a grant of quarter sessions; and, under the powers given by stat. 7 W. 4, & 1 Vict. c. 78, s. 37, they built a new jail, which was also a house of correction, and was regulated by the justices of the city and borough.

*Held*, that the bailiffs were the "keepers" of the jail within the meaning of stat. 2 & 3 Vict. c. 65, s. 15, and therefore the power of appointing a chaplain was in the town council, and not in the justices; the right of appointment not being affected by any changes which had occurred since the passing of stat. 5 & 6 W. 4, c. 76. *Regina v. Bishop of Bath and Wells*, 147.

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**II. Nature of tenancy.**

1. Effect of raising rent by consent.

Defendant being tenant from year to year at a given rent, the rent was raised, at the termination of one of the years, by consent of landlord and tenant. *Held* that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred, (in default of additional evidence,) even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain. *Do dem. Monk v. Geekie*, 841.

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Effect of payments by tenant to mortgagee, *Replevin.* Avowry for a quarter's rent in arrear. *Plea.* 1. *Non tenuit.* 2. *Riens in*

*arrere*. Issues thereon. Defendant was mortgagor in possession, having mortgaged to H. in 1834. Defendant, in 1838, demised the premises to plaintiff at an annual rent, payable quarterly; and in 1840 he gave H. an authority to receive the rent of the premises, described as occupied by plaintiff and belonging to defendant. H. communicated this authority to plaintiff, and gave him notice not to pay rent to defendant but to H.: plaintiff accordingly paid several quarters' rent to H.; but shortly before Michaelmas, 1831, when the quarter's rent mentioned in the avowry became due, defendant gave notice to plaintiff not to pay it to H. but to defendant. Plaintiff paid it to neither; and defendant distrained. At that time, a small arrear of interest was due from defendant to H. under the mortgage. *Held*, 1. That the authority and payment of rent effected no change in the tenancy, and that the issue on the plea of *non tenuit* must be found for the defendant. 2. That the issue on the plea of *riens in arrere* must also be for the defendant, since, if the facts proved amounted to a defence, they ought to have been made the subject of a special plea. But, *Semble*, that the facts did not amount to a defence. *Wheeler v. Itranscombe*, 373.

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LEASE.

Under power.

By wife to husband invalid, 423. *POWER*, II.

LEVY.

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LIBEL.

I. In respect of what transactions.

1. In respect of trade: special damage.

Declaration in case for a libel stated that plaintiff before and the time of the committing. &c., carried on the business of an engineer, and was the inventor and registered proprietor (under stat. 2 & 3 Vict. c. 17) of an original design for making impressions on articles manufactured in metal, and divers articles on which the design was used. That plaintiff, before and at the time, &c., had sold, and had on sale in the way of his said trade, articles and goods called "Self-acting tallow syphons or lubricators." And that

defendant published a libel of and concerning the plaintiff, and of and concerning him in his said trade, and of and concerning the said design, and plaintiff as the inventor, &c., thereof, and manufacturer of the articles with the said design thereon, and of and concerning the said goods which he had so sold, and had on sale, and plaintiff as the seller, as follows, viz.: "This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he calls self-acting tallow syphons or lubricators" (meaning the said design, and meaning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid,) "stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow," (meaning the defendant.) "brass founder, Stockport, takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator," &c. "Those who have already adopted the lubricators," (meaning, &c.: same innuendo as before,) "against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed."

There was no direct averment connecting the tallow syphon with the registered design mentioned in the first part of the inducement. No special damage was alleged.

*Held*, that the words were not a libel on the plaintiff either generally, or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage. *Evans v. Harlow*, 624.

2. In respect of a horse-race.

Declaration for libel alleged that a horse-race was run for stakes raised by subscription, to wit, 9100*l.* by 182 subscribers, at which a horse C. had been entered, and the owner was entitled either to let such a horse run or to withdraw him: that plaintiff, after C. was entered and before and at the time of the race, became owner of C.; that C. became lame and unfit to run, and plaintiff withdrew him; that defendants published a libel, which was set out, and which imputed that plaintiff had betted against C., remarked on the time at which the lameness appeared, and stated that the withdrawing him was an infernal robbery. Defendants pleaded not guilty, and several pleas in justification, some alleging in substance the truth of the above imputations; but all the issues were found for plaintiff: and it did not otherwise appear on the record that plaintiff had in fact betted.

*Held*, that the plaintiff was entitled to recover, for that there was no illegality in a horse-race run without fraud; and, even if

there were, plaintiff was entitled to protection of his character in respect of other matters connected with the transaction.

Although, in the course of plaintiff's evidence, for the purpose of identifying himself as the party libelled, he showed that he had actually betted more than 10% on the event of the race.

A witness for plaintiff stated, on cross examination, that by the rules of the Jockey Club the owner of a horse might bet against his own horse and then withdraw him. *Held*, that the witness might be asked, on re-examination, whether he did not consider such conduct dishonourable. *Greville v. Chapman*, 731.

3. In respect of matters connected with an illegal transaction, 731. *Anté*, 2.

## II. Special damage.

When essential to the right of action, 624. *Anté*, I. 1.

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1. Necessity of connecting averments, 624. *Anté*, I. 1.

2. What questions as to opinion of witness may be asked on re-examination, 731. *Anté*, I. 2.

3. Whether the illegality of the subject-matter, where a defence at all, is available under the general issue, 731. *Anté*, I. 2.

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I. In assumpsit to recover the purchase money of an annuity, 482. *ANNUITY*, II. 1.

## II. Possession of tenant at will.

The Limitation Act, 3 & 4 W. 4, c. 27, s. 7, which (explaining sect. 2) enacts that the right of action where any person "shall be" in possession of land as tenant at will, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year from its commencement, does not apply where the tenancy at will has ceased before the passing of the statute. In such a case, the limitation runs from the time when the tenant determines without the intervention of the act. *Doe dem. Evans v. Page*, 767.

## III. Plaintiff beyond seas.

If a plaintiff be beyond seas at the time of the action accruing, he may sue, under stat. 21 J. 1, c. 16, s. 7, at any time before his return, as well as within the limited time after his return.

*Semble*, that an affidavit to be used on a

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2. To enforce payment of sum not ascertained, 887. *HIGHWAY*, IV. 2.

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1. Where the error has been that of justices of the peace, 1. *POOR*, XXVI. 1.

2. Where the error has arisen out of an established practice, 1. *POOR*, XXVI. 1.

3. Where a party comes in to support a judicial decision in his favour.

On execution of an inquiry under a railway act, the sheriffs stopped the case on a preliminary objection. A rule was obtained calling on the sheriff to show cause why a mandamus should not issue, directing him to proceed with the inquiry. Counsel, instructed by the railway company, who had succeeded before the sheriff, opposed the rule; but a mandamus issued, and was obeyed.

The prosecutor moved, under stat. 1 W. 4, c. 21, s. 6, for costs, to be paid by the company.

*Quære*, whether the company, not being immediate parties to the rule, were liable to costs. But held that, at all events, they could not be subjected to costs for supporting a judicial decision in their favour. *Regina v. Middlesex, SHERIFF*, 365.

4. Refusal of renewed application for, 597.

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1. Against respondent parishes where justices show cause at their instance, 1. *Poor*, XXVI. 1.

2. Against a railway company coming in to support a decision by the sheriff, 365. *Anté*, V. 3.

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Cannot be exercised by wife in favour of husband, 423. *POWER*, II.

#### MASTER IN CHANCERY.

Authority to issue fiats, 115. *BANKRUPT*, III.

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##### I. Contract.

1. Under what contract the master is not bound to find employment.

By agreement between defendant and plaintiff, defendant, being the owner of a colliery, retained and hired plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and plaintiff agreed to continue defendant's servant during all times the pit should be laid off work, and, when required (except when prevented by unavoidable cause) to do a full day's work on every working day.

*Held*, that defendant was not obliged by this contract, to employ plaintiff at reasonable times for a reasonable number of working days during the term. *Williamson v. Taylor*, 175.

2. Under what contract the master is bound to pay wages, but not to find employment.

By agreement between plaintiff and defendant, plaintiff agreed to manufacture for defendant cement of a certain quality; and defendant, on condition of plaintiff's performing such engagement, promised to pay him 4*l.* weekly during the two years follow-

ing the date of the agreement, and 5*l.* weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and plaintiff engaged to instruct defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. Defendant afterwards covenanted by deed for the performance of the agreement on his part.

*Held*, that the stipulations in the agreement did not raise an implied covenant that defendant should employ plaintiff in the business during three or two years, though defendant was bound by the express words to pay plaintiff the stipulated wages during those periods respectively, if plaintiff performed, or was ready to perform, the condition precedent on his part. *Aspdin v. Austin*, 671.

3. Under what contract the master is not bound to retain the servant unto the end of the term.

Declaration in covenant stated that, by deed between defendant, D., and plaintiff, plaintiff covenanted that D. should, for five years from the date, serve defendant in the art of a surgeon dentist, and attend for nine hours each day; and defendant, in consideration of the services to be done by D., covenanted with plaintiff that he, defendant, would during the five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise), pay D. 35*s.* per week for the first year, 2*l.* per week for the second and third, and 2*l.* 2*s.* per week for the fourth and fifth: that D. was in the service for some time after the making of the deed, till dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c., to the end of the five years: but defendant, during the term, refused to permit D. to remain in his service, and dismissed him.

*Held*, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach. *Dunn v. Sayles*, 685.

4. Continuing contract, 13. *Poor*, XX. 1.

5. Service for several successive years under a general hiring: *quære* the nature of the contract, 669, n. *Poor*, XX. 5.

6. To serve agent, 662. *Poor*, XX. 7.

7. Written contract: custom of particular trade, 303. *Poor*, XX. 4.

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When evidence against master, 804. *MISREPRESENTATION*, I.

##### IV. Seduction, 297. *Post*, V.

**V. Pleading**

Trespass per quod, &c.: general issue.

To a declaration complaining that defendant debauched J., being daughter and servant of plaintiff, and alleging damage by loss of service, defendant pleaded that J. was not the servant of plaintiff.

*Held* a good plea, on special demurrer assigning for cause that the plea amounted to Not Guilty. *Torrence v. Gibbins*, 297.

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2. Contract and jurisdiction when sufficiently shown, 926. **HABEAS CORPUS**, I.

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**MISREPRESENTATION.**

I. Without fraud.

A sheriff declared in case, for that, defendants being attorneys of P., who had sued out a ca. sa. against John Wright, and the sheriff having in custody (under another ca. sa.) another John Wright who was entitled to his discharge, defendants, well knowing the premises, falsely represented to the

sheriff that the last-mentioned J. W. was the J. W. against whom P.'s writ had issued; by means whereof defendants caused the sheriff to detain the J. W. who was in his custody; for which the last-mentioned J. W. sued the sheriff, and he paid money by way of compromise.

The attorneys pleaded Not Guilty; evidence was given, for the sheriff, that his officer delivered a note to the defendants' managing clerk in P.'s action, describing the John Wright who was in custody, and inquired if that was the John Wright whom they had sued on behalf of P.; and that the clerk took the letter into the office where defendants were, and afterwards returned and told the officer that that was the John Wright; neither defendants nor the clerk at that time knowing the contrary.

*Held* by the Court of Queen's Bench that, on this evidence, the jury were warranted in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the mis-statement of their clerk. Also, that the action lay, though the detainer was made, and the money for compromise paid, by the sheriff's officer, and not by himself.

But, *Held* by the Court of Exchequer Chamber,

That a plea alleging that defendants had good and probable reason to believe, and did with good faith believe, the representation to be true, was an answer to the action.

The Court of Queen's Bench having given judgments for plaintiffs non obstante veredicto on this plea,

Judgment reversed. *Evans v. Collins*, 804.

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Mandamus to a vicar to restore T. H. to the office of parish clerk. Return, that T. H. had, on specified occasions, misconducted himself by designedly irreverent and ridiculous behaviour in his performance of his duty; by appearing in church drunk, so as to be incapable of performing it; and by indecently disturbing the congregation during the administration of the sacrament. The return stated that the alleged acts were done in the view and presence of the defendant, and after repeated reproof, whereupon the defendant removed him from his office of clerk. Plea, stating that T. H. had not been summoned to answer for his conduct before his removal.  
*Held*, that the return was bad, for not showing such summons. **Regina v. Smith, 614.**

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How far conclusive of the facts found therein  
Under the Highway Act, 5 & 6 W. 4, c. 50, s. 73, (whereby, if any timber, &c., be laid upon the highway so as to be a nuisance, and is not, after notice, removed, the surveyor,

by order in writing from one justice, may remove the same,) a justice, on information, summons and hearing, made an order in writing for the removal of plaintiff's timber, recited in such order to be laid upon a highway; and the timber was accordingly removed.

*Held* that, in an action of trespass against the magistrate, plaintiff could not give evidence, in contradiction to the order, that the locus in quo was not a highway. *Mould v. Williams*, 469.

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I. Children within age of nurture, 210. *POOR*, XVI. 1.

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#### PARTICULARS.

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Where they refer in terms to a count that has been struck out: account stated.

A declaration in debt contained a count on a deed of covenant, whereupon 1500*l.* was claimed as due for principal and interest, and also a count on an account stated. The particulars claimed 1179*l.* for principal and interest, "due on the covenant set forth," in the former count. Defendant pleaded *Non est factum* to the former count, and *Nunquam indebitatus* to the latter. Before the trial, the former count was struck out; but the pleadings and particulars were not altered. *Held* that, under the particulars, plaintiff might prove a written admission of 1179*l.* being due for principal and interest, and recover that sum on the account stated.

Another count set out a deed of covenant, dated 21st June, 1839, for payment by defendant to plaintiff of 900*l.* and interest at 5*l.* per cent., on 21st June then next. The action was commenced, and declaration dated, in July, 1843. Breach, non-payment of the 900*l.* and interest on 21st June, 1840, and that there was due and owing a large sum, to wit, 1200*l.*, whereby an action had accrued, &c. *Held* good, on motion in arrest of judgment: first, because it did not appear

that only one year's interest was due on 21st June, 1840; secondly, because, if that did appear, the averment that more was due might be rejected as surplusage, or a remittitur be entered for the excess. *Simmons v. Wood*, 170.

#### PARTNER.

I. Acts of one partner to bind the firm.

1. Acceptance of bill in fraud of the firm, 185. *BILLS*, X. 4.

2. When not on guarantee in name of firm, 833. *GUARANTEE*.

II. Bill transactions between partners.

Bill drawn by firm abroad on partner in England: effect of acceptance after release of the firm abroad, 247. *BILLS*, II. 3.

III. Settlement of accounts.

1. When it must be stamped as being an award.

Proprietors of a stage coach arranged among themselves that each should horse the coach for certain stages, and receive the payments and make the requisite disbursements on such stages; and it was the practice that one or more of the partners every month made up, and sent round to the other partners, a written account from the way-bills, showing the receipts and disbursements of each proprietor, the share of net profits, if any, due to each, and the proprietors by and to whom the ascertained shares should be paid: and the payments were made accordingly. In assumpsit by one partner against another for a balance so adjusted, and not paid, (the partnership still continuing,) the plaintiff's case rested upon a written account made out as above, but not stamped.

*Held* that, if an action at law would lie at all on a settlement of partnership accounts which was not a final close of all the partnership transactions, still the settlement in question, not appearing to have been agreed to by the partners generally, or by the plaintiff and defendant, could be binding only as an award; and that it could not so operate for want of a stamp. *Carr v. Smith*, 128.

2. Whether an action may lie thereon before a final close, 128. *Ante*, 1.

IV. Right to sue inter se.

1. By assignee of sheriff under execution against one.

A *fi. fa.* was issued against one of two partners; and, while the sheriff was in possession, a fiat in bankruptcy issued against the firm. The sheriff, under an arrangement, (the validity of which was afterwards questioned,) allowed the messenger under the commission to take possession of the goods; the messenger kept possession accordingly, and the goods were sold by the assignees, who received the proceeds. The execution creditor sued them for money had and received.

*Held* that, even if the sheriff had sold the interest of the partner against whom execution issued, an account of the partnership liabilities must have been taken before such representative could have sued for money had and received. And that the execution creditor in this case had no right of action. *Garbett v. Veale*, 408.

2. Issue on question of debt between two banking copartnerships, having members in common: when this fact cannot be objected, 310. **BANKERS, I.**

3. Whether before final settlement, 128. *Antè*, III. 1.

**V. Bankruptcy.**

Effect of bankruptcy of firm after seizure of partnership effects under *fi. fa.* against one, 408. *Antè*, IV. 1.

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**I. Contract for use of principle.**

Condition: consideration.

Declaration, in *assumpsit*, recited that plaintiff was patentee of certain improvements in the steam engine; that a company had contracted for building a steam vessel and fixing steam engines on board of it; that plaintiff agreed with defendant that it should be lawful for the company to make, construct, or manufacture and use, the said steam engines on the principle of the patent, and also to make, construct, or manufacture and use on board any other vessels thereafter to be purchased or built by the company, steam engines on the principle of the patent: and, in consideration of the premises, defendant agreed to pay plaintiff 1000*l.* on 1st August, 1837, and 1000*l.* on 1st July, 1838, and also 5*l.* per horse power for every engine which should thereafter be made, constructed, or manufactured and used, on board any other vessel thereafter to be purchased or built by the company, in which the principle should be used, *to be paid on the signing of or entering into the contract for the manufacturing or purchasing such engine*: and it was agreed that the arrangements of the apparatus, and the manner of construction and application, should be to the approbation of plaintiff, who might at his own expense employ an agent to superintend the application; and that no application or alteration of the apparatus should be made without being first approved of by plaintiff: and plaintiff agreed to furnish, at his own expense, all necessary drawings, and also, at the expense of the company's engineers, any part of the apparatus which the engineers might require. The count stated that the

company afterwards contracted with F. for the manufacturing by F. of two engines of 550 horse power, to be used on board a vessel built by the company after the agreement was made, in which engines the principle of the patent was to be used: and, on entering into the contract, defendant became liable to pay plaintiff 2750*l.* Breach, non-payment thereof.

Plea. That, after the making the contract, and before the principle of the invention had been used by the company, or F. in manufacturing the said two engines, the company and F. rescinded so much of the contract as related to the principle, and the principle never was used in manufacturing the said two engines: and that the plaintiff never employed any servant to superintend, &c., nor made nor was required to make drawings or apparatus, nor incurred any labour or expense, in respect to the said engines.

*Held* bad, on general demurrer; because the actual use of the principle was not the consideration for or condition precedent to, the payment, and the liability to pay accrued upon the company making the contract with F., and could not be afterwards got rid of by the non-user. *Hall v. Bainbridge*, 233.

**II. Sale of patent article.**

Fitness for purpose, 288. **VENDORS, I.**

**III. Libel in respect of, 624. LIBEL, I. 1.**

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**I. Equivalent to.**

By writing off in account, 949. **STAMP, I.**

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Fraudulent endorsement of bill by depository, 965. **BANKRUPT, XI. 1**

## III. Largeness.

Plea to two counts, bad as to one, 247. **BILLS**, II. 3.

## IV. Puis darrein continuance.

A plea puis darrein continuance may be amended on terms, though an assize has elapsed since it was pleaded. *Holroyd v. Reed*, 594.

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1. Not guilty. **NOT GUILTY**.
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1. Enjoyment as of right, 584. **PRESCRIPTION**, V.
2. Sufficiency of seizure, or that there were no other goods that could be seized, in plea by sheriff that he withdrew from part by direction of plaintiff, judgment creditor, and could not sell the residue, 758. **EXECUTION**, III.
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4. Interference of assignees, in pleading plaintiff's bankruptcy to an action by him for after-acquired property, 965. **BANKRUPT**, XI. 1.

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After judgment by default, 322. **BOND**, II. 1.

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## POOR.

## I. Poor law commissioners.

Their rules.

1. How proved. *Regina v. Dartmouth, Earl*, 885, n.
2. Authority as an act of Parliament, 878. **POST**, IX. 1.

## II. Guardians.

1. Of union, not parish officers, 506. **POST**, XXIV. 1.
2. Of parish, or parish officers.

Where the laws for the relief of the poor in a single parish are administered by a board of guardians under stat. 4 & 5 W. 4, c. 76, s. 39, the guardians are officers of the parish, and a notice of char-eability, under sect. 79, signed by three or more of them, is well signed.

By a local act, 13 G. 3, c. 50, several parishes were united for the purposes of the relief of the poor, and a board of guardians was constituted for the united district, with full powers for maintaining, relieving and employing the poor; repairing and enlarging workhouses; laying rates for the purposes of the act on the rateable property in the district (distinguishing each parish); binding poor children apprentices; taking bastardy bonds; and granting parish certificates: and it was provided that no poor rate was to be laid in the several parishes or either of them, other than was directed by the act; that no settlement appeal should be made, prosecuted or defended by any of the churchwardens or overseers of the several parishes without an order of the guardians; that the act shou'd not be construed to alter the laws then subsisting, respecting the removal of the poor, between any parish or place without the district, and any of the parishes within the same, but such laws should continue in force, except in the case of certificates and appeals (as above); and that all costs which should accrue to any of the parishes thereby united, from the prosecution or defence of any settlement appeal, should be defrayed out of the rates to be raised by virtue of the act.

An order was obtained for the removal of a poor person from one of the united parishes

to a parish out of the district. And a copy of the order and examinations and a notice of chargeability was signed and sent to the overseers of the last-mentioned parish, not by the churchwardens and overseers of the removing parish, but by three guardians of the united district, both the notice and order stating that the pauper was chargeable to the removing parish.

*Held*, that the guardians of the united district were not officers of the several parishes comprised therein, and that the notice of chargeability was insufficient. *Regina v. Lamle's, Guardians of*, 513.

3. Of parishes united under local act, when not officers of the parishes, 513. *Antè*, 2.

### III. Parish officers.

1. Acts by the majority, 500. *Post*, XIV. 2.  
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4. Signature for, by another person: showing authority aliunde, 506. *Post*, XIV. 2.

5. Guardian of union, is not, 506, 513. *Antè*, II. 2. *Post*, XIV. 2.

6. Of parish, 513. *Antè*, II. 2.

7. Their agency. *Post*, VIII.

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1. Effect of one of the body being de facto both churchwarden and overseer, 640. *Post*, XXIV. 2.

2. What they may do notwithstanding defect in title, 640. *Post*, XXIV. 2.

3. Title how not questioned, 640. *Post*, XXIV. 2.

### V. Assistant overseer.

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### VI. Workhouse.

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### VII. Expenditure of money.

Authority inferred from previous conduct, 66. *Post*, XXIX.

### VIII. Agency.

1. Inference of authority to expend money from previous conduct, 66. *Post*, XXIX.

2. Signature by agent, 506. *Post*, XXV. 1.

3. Of parish officers informally appointed, 640. *Post*, XXIV. 2.

4. Of parish officers in matters of appeal, 912. *Post*, XXI. 2.

### IX. Overseers' accounts.

1. Audit by justices.

The authority of justices in petty sessions to audit the accounts of overseers, under stat. 50 G. 3, c. 49, s. 1, is not taken away, as to any portion of such accounts, by stat. 4 & 5 W. 4, c. 76, s. 47; and the justices may allow items, which have been disallowed by the auditor under the latter statute at his quarterly audit.

On motion for a mandamus to justices, the court, if they doubt whether the writ should or should not be granted, will not direct it to issue merely in order that the

justices may make a return, and be protected by stat. 6 & 7 Vict. c. 67, s. 3, if a peremptory mandamus should issue and be obeyed.

And, where a mandamus is directed to justices, they ought not to make a return instead of obeying the writ, merely to gain the protection of the statute. *Regina v. Dartmou'h, Earl*, 878.

2. Distress warrant for balance, 878. *Antè*, 1.

### X. Subdivision of parish into townships.

That part of the parish of Halesowen, which lay in Shropshire, consisted of several townships, H., O., and others, but maintained its poor out of a common fund, administered by officers for the whole of that part of the parish. Afterwards, in obedience to a mandamus, separate appointments of overseers were made for the respective townships, and each then maintained its own poor. Before the subdivision, a pauper was settled in the Shropshire district of Halesowen, by a hiring and service in township H. *Held*, that he was not therefore removable to township H. as the place of his settlement, when overseers were appointed for that place. *Regina v. Huntington*, 273.

### XI. Maintenance by relations.

1. An order of maintenance under stat. 59 G. 3, c. 12, s. 26, directing payments to be made so long as the poor person shall be "chargeable," is bad; the word "chargeable" not being equivalent to the words "not able to work," used in the statute.

An order for maintenance of paupers by a relation, if it direct an entire sum to be paid for the maintenance of three, so long as three shall be chargeable, is bad as to all. *In re Mor'en*, 591.

2. Order bad in part, 591. *Antè*, 1.

3. Duration, 591. *Antè*, 1.

### XII. Removal: complaint by parish officers.

1. Need not be in writing, 653. *Post*, 2.

2. By one with authority of all.

Under stat. 13 & 14 C. 2, c. 12, s. 1, the complaint upon which an order of removal is made, need not be in writing. Therefore, where a written complaint was made to the removing justices, signed by only one overseer, and purporting to be his complaint, but it was shown at sessions that the complaint was in fact made with the concurrence of all the parish officers, this was held to warrant an order of removal, purporting to be made on the complaint of the overseers, though it did not appear that evidence of such concurrence had been laid before the removing justices.

An examination stated a hiring and service, and relief given by the appellant parish during the pauper's residence elsewhere. The appellants, in their notice of grounds of appeal, alleged that the pauper never

acquired a settlement in the appellant parish by such hiring and service, "or by any other means." At the trial, the respondents proved only the relief.

*Held* that the appellants, in answer, were entitled, under their notice, to show that the relief was given by mistake, and that the respondents had subsequently relieved the pauper while resident in their parish. *Regina v. I edingham*, 653.

3. By assistant overseer: what course the sessions ought to take on appeal.

If the complaint on which paupers are removed purports to be "the information and complaint of R. R., assistant overseer," without any further statement as to the complainant, and copies of the order of removal and examinations are transmitted by the removing parish according to stat. 4 & 5 W. 4, c. 76, s. 79—

*Quære*, whether the sessions, on appeal, may at once treat the complaint as made without authority, and on that ground quash the order of removal, or whether they must receive evidence, if tendered, to show that the assistant overseer was in fact authorized to lay the complaint.

The examinations on which an order of removal was made stated that the pauper came to live with B., as a farm servant: that he was not engaged for any particular time, but that B. found him board, washing, lodging, and clothes for so long a time as he stayed: that pauper continued in B.'s service in that manner, without leaving, for three years, during all which time he lived and slept on the farm; that there never was any other agreement come to, but B. found pauper in board, washing, clothing, and lodging during the said service.

*Held*, that the examinations did not show any hiring, and were therefore insufficient. *Regina v. Catteral*, 901.

4. By assistant overseer of union, as such, whether bad on the face.

If the complaint on which paupers are removed purports to be "the information and complaint of D., general assistant overseer of the poor of the Preston union," of which the removing township is part, without any further statement as to the complainant, and copies of the order of removal and examinations are transmitted by the removing parish, according to stat. 4 & 5 W. 4, c. 76, s. 79, *Quære*, whether, on appeal, it be ground of objection that the complaint was made by a person not appearing, on the face of the document, to have any authority?

*Semble*, per Patteson, J., that, if the sessions, on hearing evidence, have confirmed the order, this court may presume that an authority in fact was proved.

If pauper in his examination states that he took a house for a year at 19/., and re-

sided, &c., and "paid rent" for the whole time of his tenancy, this does not show the house to have been held, and "the rent for the same" paid, within stat. 59 G. 3, c. 50. *Regina v. Leeds*, 907.

5. Presumption of authority, 907. *Antè*, 4.

### XIII. Removal: examinations.

1. Good, though stating an essential fact only inferentially, 662. *Post*, XX. 7.

2. Bad, for insufficiently negating marriage, 669, n. *Post*, XX. 5.

3. Bad, for not showing hiring, 901. *Antè*, XII. 3.

4. Bad, for not showing payment of the rent, but only of rent, 907. *Antè*, XII. 4.

5. Bad, for not showing consent of wife to her separation from husband, 916. *Post*, XV.

6. Heading: sufficient description of subject of inquiry, 916. *Post*, XV.

7. See also grounds of appeal, *Post*, XXV.

### XIV. Removal; chargeability; notice of chargeability.

1. What is chargeability, 591. *Antè*, IV.

2. Notice, by whom sent.

Under stat. 4 & 5 W. 4, c. 76, s. 79, notice of chargeability must proceed from a majority of the parish officers, or three guardians at least, of the removing parish.

Whether the notice on the face of it must show, by the signatures of the parties or otherwise, that it does proceed from such a majority, &c., *quære*. *Regina v. Westbury*, 500.

3. What it must show on the face of it, 500. *Antè*, 2.

4. Signed by guardians of parish, sufficient, 513. *Antè*, II. 2.

5. Signed by guardians of district of parishes insufficient, 513. *Antè*, II. 2.

### XV. Removal: wife from husband.

Consent to separation.

Assuming that a wife may be removed to her maiden settlement without her husband, by consent of both, such consent is not to be inferred from examinations of the husband and wife taken at the same time before the removing justices, in which the husband states his consent, and the wife says nothing on the subject.

The first examination purported, by the heading, to be taken by the justices touching the settlement of J. M., the husband: other material ones purported to be taken "at the time, place, and in manner aforesaid:" but one of these related entirely to the wife's maiden settlement, and the order removed her and her children, and not the husband. *Held*, that the examinations were not on that account objectionable, on appeal against the order.

The examinations stated that the husband and a parish officer had diligently inquired in all likely places for the husband's settle-

ment, but had not found any, and believed he had none. *Held*, that the search was sufficiently stated, and that the examinations were not defective for omitting to show with more certainty that the husband had not a settlement in Scotland, Ireland, the Isle of Man, &c., to which he and his family might have been removed under stat. 59 G. 3, c. 12, s. 33. *Regina v. Leeds*, 916.

#### XVI. Removal: parent and child.

##### 1. Children within age of nurture.

The rule, that a child within the age of nurture cannot be separated from the mother by order of removal, is established for the benefit of the child, and therefore cannot be dispensed with by the mother's consent.

A woman having children by a first marriage, born in parish B., married again; her husband was unable to maintain the children; and the family became chargeable to parish A. The mother consented, and wished that the children, then in the workhouse of A., and being within the age of nurture, should be removed to their own parish; and two justices thereupon made an order for removing them to B., which the sessions on appeal confirmed, subject to a case. This court quashed the orders. *Regina v. Birmingham*, 210.

##### 2. Consent, 210. *Antè*, 1.

#### XVII. Settlement, generally.

##### 1. Effect of subsequent division of parish into townships maintaining their own poor, 273. *Antè*, X.

##### 2. Extinction, 273. *Antè*, X.

##### 3. Effect of general traverse of, 653. *Antè*, XII. 2.

#### XVIII. Settlement: wife's maiden settlement.

##### 1. What search for husband's settlement sufficient, 916. *Antè*, XV.

##### 2. Heading of the examinations, 916. *Antè*, XV.

#### XIX. Settlement by apprenticeship.

##### 1. What statement sufficient to exclude the inference of a binding by the parish; covenant indenture, 484. *Post*, XXII. 1.

##### 2. What statement sufficient to show that an instrument has been destroyed. *Regina v. Cumberworth Half*, 488.

#### XX. Settlement by hiring and service.

##### 1. Completion of service before 14th August, 1834.

Pauper being hired as a yearly servant on 30th November, 1828, continued to serve under the hiring till 1837. On the 30th November, 1833, and for forty previous days, she resided in the parish of St. Pancras. In March, 1834, and thence till 1837, she resided in St. Marylebone. *Held* that, by the operation of stat. 4 & 5 W. 4, c. 76, s. 65, she was settled in St. Pancras and not in St. Marylebone. *Regina v. St. Pancras*, 13.

##### 2. Continuing contract, 13. *Antè*, 1.

##### 3. Subsequent subdivision of parish, 273. *Antè*, X.

##### 4. Exceptive hiring: evidence of custom to explain written contract.

Pauper agreed in writing to work for R. & Co. in their trade. The written terms were, that pauper and others engaged "to serve B. & Co. from 11th November, 1815, to 11th November, 1817, at prices. &c.;" "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants."

On the trial of an appeal raising the question of settlement by a year's service under such hiring, it appeared that pauper had occasionally absented himself on holidays during the year.

*Held*, that a witness might be asked whether it was not the custom of persons employed in the particular trade, under contracts like that of the pauper, to have certain holidays in the year, and the Sundays to themselves.

The sessions quashed the order, subject to a case, in which it was stated that the evidence had been rejected, and that, if this court held it admissible, the appeal should go back to the sessions to be reheard. This court refused to send the case back, and quashed the order of sessions. *Regina v. Stoke upon Trent*, 303.

##### 5. Omission in examination to negative marriage.

A pauper was removed to P., on her examination, in which she stated that, while unmarried, she served for several years under a general hiring in P. On appeal, the sessions confirmed the order, subject to a case, in which they stated as their opinion, that the examination disclosed sufficient evidence of a settlement by hiring and service; adding, that the question for this court was, whether it did disclose sufficient evidence.

This court quashed the order of sessions, because the examination did not show that the pauper was unmarried at the time of the contract of hiring. *Regina v. St. Paul Covent Garden*, 669, n.

##### 6. General hiring not inferred from service, 901. *Antè*, XII. 3.

##### 7. Examination: yearly hiring stated only inferentially.

Justices removed to the township of P. as upon a settlement by hiring and service, on the pauper's examination; which stated that he went to work at C.'s factory called R. Mill, in the township of P.; that there was a custom in the mill, under which he worked, requiring the workpeople to give a fortnight's notice before leaving C.'s employment; that he remained in C.'s employment better than two years, residing and sleeping in P.; that the works consisted of two mills; that, when he wanted to leave the first mill, after work

ing there a year, to go to the other, he had to give a fortnight's notice that, after working in the other a year, he wished to leave, but was not allowed to do so without a fortnight's notice, and that he afterwards left on receiving a fortnight's notice from the overlooker.

*Held*, that from this examination the justices might infer a yearly hiring, and that the examination was sufficient, though the pauper only stated the facts from which the inference resulted, and not the fact inferred.

On appeal, the sessions confirmed the order, subject to a case setting out the evidence on the trial, which agreed with the examination except so far as is varied in the following particulars.

Pauper went to work as a piecer at C.'s first mill, to serve the person working the mill as master spinner, who was C. The practice of the mill is, that the piecers assist spinners to whom they are attached: the master spinner pays the spinner the whole wages in proportion to the work done; the spinner pays, engages, and dismisses the piecer, without the master spinner's interference. Pauper was engaged in this way at the first mill, by a spinner, at wages of so much per week, paid every fortnight, a fortnight's notice ending at any week being required before quitting. The second mill was worked by M., who took it of C., had the sole management of it, and spun by commission for C. at so much per hundred weight of yarn spun: but the mill was under the superintendence and control of C. Pauper engaged with M. to work as a spinner, and be paid according to the quantity of work done; nothing was said as to how long he was to remain; the same understanding, as before, prevailed as to notice. He had received his wages every fortnight from M.'s manager.

*Held* that, on this evidence, the sessions were warranted in finding, if they so thought fit, a yearly hiring to, and service with C. And this court confirmed the order of sessions, assuming that the sessions had pursued the course proper in stating a case, and therefore intended to state their own finding of the fact, subject to the opinion of this court whether the evidence warranted the finding, and had not intended to ask this court to find the fact. *Regina v. Pilkington*, 662.

8. Inference of general hiring from a contract for weekly wages and fortnight's notice, 662. *Antè*, 7.

9. To what master: hiring to work for servant or agent, 662. *Antè*, 7.

#### XXI. Settlement by payment of rates.

1. Payment by landlord insufficient.

Pauper occupied premises at a yearly rent, under an agreement by which the landlord was to pay all rates. The rent was higher on that account than it would otherwise

have been. Pauper was assessed to the poor as the occupier; but the landlord always paid the rate.

*Held*, that the pauper did not gain a settlement by being charged with or assessed to, and paying the poor rate, under stat. 4 W. & M. c. 11, s. 6, or 4 & 5 W. 4, c. 76, s. 66. *Regina v. South Kilvington*, 216.

2. Ground of appeal: allegation of payment does not show charge.

A certiorari issued to bring up all orders made between "The Inhabitants" of the parish of M. and those of the parish of O. An order of sessions was returned, made on appeal by "The churchwardens and overseers" of M. against an order of removal from O. to M.

*Held*, no variance.

A statement, in grounds of appeal, that the pauper became tenant of a house, &c., occupied it for seven months, and "paid" the parochial rates or taxes in respect of such house, does not show a settlement by being charged with and paying public taxes, &c., within stat. 3 & 4 W. & M. c. 11, s. 6. *Regina v. St. Cluve's*, 912.

#### XXII. Settlement by renting a tenement.

1. By renting the feeding of a cow: what statement insufficient.

The examination of a pauper stated that, when fourteen years old, he "was put out an apprentice by covenant indenture" to A. B. for seven years, and went to and resided with him in C. under the indenture for five years, when pauper's brother purchased his time out, and the indenture was destroyed.

*Held* that, for the case of a common binding, this statement was sufficiently particular; and that it was not to be inferred from the language used that the binding might have been by a parish.

The notice of grounds of appeal stated that the pauper in 1812 "rented and occupied" a "tenement" in "D." consisting of the keeping or feeding of a cow, of which he was the owner, by and on the land and premises of J. H. for one whole year, and which was of the value of 10*l.* a year at least, and for which he paid J. H. 4*s.* a week during the whole year.

*Held*, that the pauper did not appear by this statement to have enjoyed such an interest in the profit of land as entitled him to a settlement in D. *Regina v. Cumberworth Half*, 484.

2. Examination bad, for not showing payment of the rent, 907. *Antè*, XII. 4.

3. Payment of rates by landlord, 216. *Antè*, XXI. 1.

#### XXIII. Settlement, as evidenced by relief.

1. When mistake may be shown under general traverse, 653. *Antè*, XII. 2.

2 When subsequent relief by respondents

may be shown under general traverse, 653. *Antè*, XII. 2.

**8. Relief in parish workhouse locally situate out of parish.**

Relief given by parish officers in a place out of their parish, but where they, by contract, have their paupers maintained, is the same in legal effect, as to settlement, as relief within the parish, and is therefore not *prima facie* evidence that the pauper is settled in the relieving parish.

Although it do not appear that such place was parish property, or established according to any statute for building or providing parish houses. *Regina v. St. Giles in the Fields*, 872.

**XXIV. Appeal against order of removal: notice of appeal.**

**1. Description of order appealed against.**

Notice of appeal against an order of removal described the order by its contents, but did not state the names of the removing justices. On the trial of the appeal this was argued as a preliminary objection; and the sessions, without further hearing, confirmed the order, subject to the opinion of this court, on a case, which submitted, as the point for decision, whether the notice was defective for the reason above mentioned; directing that, if this court held the notice good, the case should be sent back to the sessions, to be heard on the merits.

This court overruled the objection without argument, and allowed the case to go back to the sessions. *Regina v. Westhoughton*, 300.

**2. What parish officers may give: the same person churchwarden and overseer.**

A pauper having been removed to parish A., by an order directed to the churchwardens and overseers of A., notice of appeal and grounds of appeal was served, purporting to be signed by M., "churchwarden," and M. and N., "overseers." Two churchwardens had been appointed, of whom M. was the survivor; M. and N. had also been appointed the only overseers; but which appointment took place first did not appear.

*Held*, that the appellants were entitled to be heard upon this notice. *Regina v. Leominster*, 640.

**XXV. Appeal against order of removal: statement of grounds of appeal.**

**1. Signature by majority.**

Notice of grounds of appeal against an order of removal was signed by W. R., churchwarden, and T. G., overseer: also by W. P. H. "for" W. H., who was a churchwarden; and by J. E., "guardian." The parish had two churchwardens, two overseers, and one guardian, and was part of a union formed under stat. 4 & 5 W. 4, c. 76.

*Held*, that the notice of grounds was insufficient under stat. 4 & 5 W. 4, c. 76, s.

81, for that the signature of W. P. H. for W. H. could not avail, no evidence of authority appearing: and J. E., as guardian of a union, was not guardian of the appellant parish, and was therefore not competent to sign under sect. 81. *Regina v. Surrey Justices*, 506.

**2. Signature by agent: showing authority, 506. *Antè*, 1.**

**3. Signature by guardian of union insufficient, 506. *Antè*, 1.**

**4. General traverse: relief shown to have been given by mistake, 653. *Antè*, XII. 2.**

**5. Setting up settlement by taxation, bad as alleging payment but not charge, 912. *Antè*, XXI. 2.**

**6. See also Examinations, *Antè*, XIII.**

**XXVI. Appeal against order of removal.**

**1. Jurisdiction to enter appeal and confirm order.**

On notice of an order removing paupers from S. to C., the overseers of C. gave notice of appeal, which they afterwards countermanded, reserving the right to appeal when the paupers should be actually removed. At the following sessions the overseers of S., according to the alleged practice of the sessions, entered an appeal against the order, as by the overseers of C., but without their knowledge or consent; and thereupon the order was confirmed with costs. More than six months after the confirmation, the pauper was removed to C.; whereupon the overseers of C. applied at the next sessions to erase the entry of the previous appeal and order, and to enter their appeal against the order of removal. The sessions refused.

*Held* that, although the sessions ought to have entered and heard the second appeal, they could not erase the previous entry without the authority of this court; and that, the entry of the first appeal and order thereon being irregular and without jurisdiction, and likely to prejudice C. on a future appeal, a mandamus was rightly issued on the prosecution of the overseers of C. to erase it from the records.

The court, in its discretion, refused to order the respondents to pay the costs of the mandamus, and of a peremptory mandamus after argument on the return, though it appeared that the return had been supported on their behalf and not that of the justices; inasmuch as the entry was made by the error of the justices, and in conformity with a practice which had long prevailed at the sessions.

*Semble*, that the court, under stat. 1 W. 4, c. 21, had power to order the respondents to pay the costs, including those of both writs, though it was not expressed on the return, according to sect. 4, that such return was made on behalf of the respondents. *Regina v. West Riding, Justices*, 1.

2. Erasure of former entry, *Antè*, 1.
  3. The inhabitants are the parties, the parish officers their agents, 912. *Antè*, XXI. 2.
- XXVII. Appeal against order of removal: costs.

Respondents' remedy where appeal abandoned before entry, 1. *Antè*, XXVI. 1.

XXVIII. Bastardy.

1. Application against putative father: order for costs on dismissal of the application.

Under stats. 4 & 5 W. 4, c. 76, s. 73, and 2 & 3 Vict. c. 85, s. 1, the Quarter Sessions of the West Riding of Yorkshire made an order, reciting that the parish officers of a township in that riding had applied at Petty Sessions for an order of maintenance, and that the party against whom the application was made had declared himself desirous that the charge should be determined at Quarter Sessions; and adjudged that the application should be dismissed, and the parish officers pay the costs of opposing it.

1. *Held* to be no objection to the order, that it did not appear when the child was born.

2. Admitted that, as against the parish officers, it must be intended that the township supported its own poor.

3. *Held*, that the parish officers could not object that the township might be part of a union, and that the guardians, if so, were the proper parties to the proceeding; first, *semble*, because the parish officers, who were the applicants for the order of maintenance, must be presumed to know the fact; secondly, at any rate, because, in the absence of any allegation, it could not be presumed that there was a union comprehending the township.

4 and 5. The order of Quarter Sessions stated that the township above mentioned was situate within the division of S., in the West Riding; that at the Petty Sessions holden at Barnsley, in and for the said division of S., the application was made to the justices of the peace holding such Petty Sessions; that the said justices adjourned the hearing to a certain day; and that, on such day, the party appeared before the justices in Petty Sessions holden at Barnsley aforesaid, and declared, &c. *Held*, that it sufficiently appeared that the justices at Petty Sessions were justices of the West Riding, and that Barnsley, to which they had adjourned, was within the West Riding.

6. The order did not show that any application had been made for the costs. *Held* no objection, inasmuch as it appeared that the parish officers had applied for the order of maintenance. *Regina v. Ardsley*, 71.

2. Against party who had no right to make the application.

Parish officers applied for an order of maintenance under stat. 2 & 3 Vict. c. 85,

s. 1; and the person charged as putative father removed the application to Quarter Sessions under sect. 3. On the opening of the case at sessions, it was objected that the applicants were the overseers of a parish forming part of a union under a local act, and the guardians of such union, and not the parish officers, were the parties authorized to apply. The sessions, on this ground, dismissed the application, but without costs, thinking they had no jurisdiction to grant them.

On motion for a mandamus to enter continuances, and award costs: *Held*, that the application had been sufficiently heard to warrant granting costs under stat. 4 & 5 W. 4, c. 76, s. 73; and that, although the overseers were not the proper parties to apply for the order of maintenance, yet, having so applied, they were liable to costs. *Regina v. Exeter, Recorder*, 342.

XXIX. Vagrants.

Constable's expenses, by whom to be defrayed.

A superintendent constable, appointed for a division comprehending the parish of C., under stats. 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, expended money in fees to the justice's clerk in respect of vagrants apprehended in the parish of C. The parish, for many years before those statutes passed, had defrayed such expenses when incurred by the parish constables.

*Held*, that the parish was liable for the expenses, inasmuch as stat. 2 & 3 Vict. c. 93, s. 8, put such constables in the situation of parish constables, and therefore authority might be inferred, from the previous conduct of the parish, to make the disbursements in question.

And that these were not to be deemed extraordinary expenses, within the meaning of stat. 2 & 3 Vict. c. 93, s. 18, so as to be payable by the division under stat. 3 & 4 Vict. c. 88. *Regina v. Chelmsford*, 66.

XXX. Evidence.

1. Declarations by rateable inhabitants, 187. *EVIDENCE*, LX. 1.
2. Declarations by authorized official agents, 187. *EVIDENCE*, LX. 1.
3. Custom of trade, in explanation of written contract, 303. *Antè*, XX. 4.

XXXI. Special case.

1. Notice of certiorari: affidavit, 201. *CERTIORARI*, IV. 1.
2. Sending back to sessions, 300, 303. *Antè*, XX. 4.
3. This court must not be asked to find facts, 762. *Antè*, XX. 7.
4. Finding of sessions construed so as to make their question a proper one, 662. *Antè*, XX. 7.

XXXII. Certiorari.

1. To bring up orders between "the la

habitants" of the two parishes: order returned between the "churchwardens and overseers," &c., no variance, 912. *Antè*, XXI. 2.

3. Notice and affidavit. *CERTIORARI*.

### PORT.

#### I. Creation of.

##### 1. Right of crown.

In an action by the corporation of Exeter, for petty customs and port duties, payable on goods landed at Teignmouth, the plaintiffs, to show the receipt of such dues in former times, produced a series of accounts purporting to be of the receipts by the receivers of the city. It was proved that the receivers' accounts were regularly audited, and that no one could (at the time to which the evidence related) be mayor till he had been receiver and had his accounts audited. Down to a certain time, the accounts were not signed at all; afterwards they were regularly signed by the auditors only. One entry of the latter class stated the receipt by B., a receiver, of a sum for town dues from W.; and, with this entry, was found a paper stating that W. had received a sum for town dues, almost exactly corresponding with that stated in the entry, and at the time of which it bore date. No evidence was given as to the handwriting of the latter paper. B. and W. were both dead. The documents were more than thirty years old. No one of them stated the receipt to be "by me;" but the third person was used. *Held*, that all the documents were admissible evidence.

The crown is entitled (except where vested rights would be interfered with) to create a port for the landing of goods, and to assign its limits, though the soil be in a subject: and such creation is a good consideration for the receipt of petty customs and poor dues throughout the port so assigned. And such petty customs and port dues might, in ancient times, be granted away by the crown.

The plaintiffs proved a grant of the town to them, by the crown in fee farm; and it was not disputed that they were owners of a port of some extent, with some dues; they also proved the receipt, in fact, of the dues for goods landed at Teignmouth, and leases by them of such dues. *Held* to be evidence from which a jury might infer that the port extended to Teignmouth, and that the dues were payable to the plaintiffs for goods there landed; though Teignmouth is situate on a different river from Exeter, and the mouths of the rivers are several miles apart; and though no evidence was given of repairs or other services performed by the plaintiffs at Teignmouth, or of any right to the soil there, in themselves or the crown. *Exeter, Mayor, &c., v. Warren*, 773.

2. In alieno solo, 773. *Antè*, 1.

#### II. Port dues and tolls.

1. Consideration for receipt of, 773. *Antè*, I. 1.

2. Right of crown to grant away, 773. *Antè*, I. 1.

3. Action for against corporation aggregate, 526. *TOLLS*, 1.

#### III. Evidence.

1. Receipt of dues, evidence of extent of port, 773. *Antè*, I. 1.

2. Unsigned accounts of receipts of port dues, 773. *Antè*, I. 1.

3. Accounts more than thirty years old, 773. *Antè*, I. 1.

4. Writing found with old accounts, 773. *Antè*, I. 1.

### POSSESSION.

I. Adverse: tenant at will, 767. *LIMITATION*, II.

II. The only matter in issue under plea denying property, 139. *TRESPASS*, II.

### POWER.

I. Distinction as to leasing power where the lessor has a power, and where he has a power with an intent, 423. *Post*, II.

#### II. Execution of, in whose favour.

By wife in favour of husband, when insufficient.

Lands were settled, in contemplation of marriage, with a remainder for life limited to the intended wife, if she survived her husband; and with power to her, if she survived, by indenture under her hand and seal to lease "to any person or persons for any term or number of years not exceeding twenty-one years, in possession, and not in reversion, remainder, or expectancy; so as upon every such lease there be reserved and made payable, during the continuance thereof, the most and best improved yearly rent that can be reasonably had or obtained for the same, without taking any sum or sums of money or other things by way of fine or income for or in respect of such lease or leases; and so as none of the said leases be made dispunishable of waste by any express words to be therein contained; and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved; and so as the lessee or lessees, to whom such lease or leases shall be made, do seal and deliver a counterpart or counterparts thereof."

The marriage took place; the wife survived the husband, married again, and after the second marriage, leased to her second husband, who executed a counterpart.

*Held*, that such lease by wife to husband was not a good execution of the power, *Doe dem. Hartridge v. Gilbert*, 423.

## PRACTICE.

I. Striking out pleadings after the judgment by default, 322. *Bona*, II. 1.

II. Rule against renewed applications.

The general rule of practice is, that a party failing in a motion by reason of a defect in his affidavit shall not repeat his application on an amended affidavit, showing no ground of application which might not have been presented before.

The only exceptions which the court will generally admit are, where the amendment consists merely in correcting an error in the title or jurat of the affidavit.

Where a motion for costs of mandamus was on affidavit entitled "*The Queen, on the prosecution,*" &c., against "*The Directors of the Great Western Railway Company,*" and in the body of the affidavit it was stated that the prosecutors had moved for a mandamus against "*The Directors,*" &c., whereas in fact the application had been made against "*The Great Western Railway Company,*" and on this ground the rule was discharged.

*Held*, that a second motion for costs could not be made on an affidavit corrected in the title and body as to the description of the defendants, though not altered in any other material respect. *Regina v. Great Western Railway Company*, 597.

III. Right to begin.

1. On cross demurrers. *Hilton v. Earl Granville*, 710.

2. At Nisi Prius, 447. ATTORNEY, I. 1. 467, n. REPLEVIN, II.

IV. See also ABATEMENT. AFFIDAVIT. AMENDMENT. ARREST. ATTACHMENT. ATTORNEY. BAIL. BREACH. CONTEMPT. COSTS. DAMAGES. DECLARATION. DEMURRER. ERROR. EXECUTION. FEIGNED ISSUE. INQUIRY. JUDGMENT. NEW TRIAL. NISI PRIUS. PROCESS. REGULE GENERALES. REMITTITUR. RULE. SCIRE FACIAS. SUGGESTION. TRIAL. VERDICT.

## PREFERENCE.

Fraudulent, 115. BANKRUPT, III.

## PRESCRIPTION.

I. What may be claimed as a prescription.

Right to undermine houses in working coal mines, 701. *Post*, III. 1.

II. Against whom.

Against copyholders, 701; *Post*, III. 1.

III. Unreasonable.

1. As destructive of subject matter.

To a declaration in case for digging mines near the foundations of plaintiff's dwelling-house, without leaving due support, so that the said foundations were injured, and the dwelling-house cracked, sank in, and was in danger of falling and being destroyed, defendant pleaded,

That the dwelling-house, from time whereof, &c., was part of the manor of N., and was situate in a township within the said manor; that the queen was seized in fee of the manor, and of the mines, collieries, and seams of coal therein; and that she and all those whose estate she had, &c., and their tenants and those to whom she or they have granted license to mine, from time whereof, &c., have been used, &c., and of right ought, &c., to work the said mines, collieries, &c., under any messuages, dwelling-houses, buildings and lands, parcel of the manor and within the township, and, for the purpose of working the said mines, collieries, &c., to dig and make under ground all such mines, pits, &c., under the said messuages, dwelling-houses, buildings, and lands, or any part thereof, as might from time to time be expedient and necessary for that purpose, and out of the said mines, &c., to get the coal, &c., and carry away and convert the same, doing no more than necessary for the purpose aforesaid, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation, when demanded, for the use of the surface, or any damage occasioned thereto in and about the working of the mines, collieries, &c., but without making compensation in respect of the surface on any other account, and without making compensation for any damage occasioned to any messuages, dwelling-houses, or other buildings within and part or parcel of the manor by and for the purpose of working the said mines, collieries, &c. Justification, stating that defendant, as lessee and grantee of the crown, committed the alleged grievances, &c., in exercise of the above right, doing no more than was necessary for the purposes aforesaid. *Held*, that the prescription was void, as being unreasonable.

That a custom, similarly pleaded, was void on the same ground.

That the right, if maintainable in itself, might have been pleaded in virtue either of prescription or of custom.

And that it might have been claimed as well against copyholders as against tenants of customary freehold. *Hilton v. Earl Granville*, 701.

2. As producing a common nuisance, 701. *Ante*, 1.

3. As being indefinite.

In trespass for breaking plaintiff's close, and digging and carrying away clay, defendant justified as owner of a brick-kiln, and pleaded that all occupiers thereof, for thirty years, had enjoyed, as of right, &c., a right to dig, take and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick kiln, in every year, and at all times of the year.

*Held*, unreasonable, and bad. *Clayton v. Corby*, 415.

IV. Prescriptive liability.

Annulled by destruction of subject matter, 379. *HIGHWAY*, III. 1.

V. Pleading.

Twenty years' enjoyment as of right.

A plea under stat. 2 & 3 W. 4, c. 71, ss. 2 and 5, alleging an easement enjoyed for twenty years, must state, in the words of sect. 5, that the enjoyment was had "as of right." A plea stated that H., under whom defendant justified, was occupier of a close, and that he, while such occupier, and all other prior occupiers of the said close, for twenty years next before action brought, and before the times when, &c., "have had, used, and actually enjoyed without interruption, and of right ought to have had," &c., and that H., at the times when, &c., of right ought to have had, &c., and still of right ought to have, &c., for himself, &c., occupiers of the said close, a certain way to pass, &c., as to the said close of H. with the appurtenances belonging and appertaining; which averment the plaintiff traversed.

After verdict for defendants on this issue, *Held*, on motion for judgment non obstante veredicto, that the plea was bad: and the court gave judgment accordingly. *Holford v. Hankinson*, 584.

PRESENTMENT.

In court of sewers, 357. *SEWERS*, I.

PRESUMPTION.

- I. That loss at an inn is occasioned by negligence of innkeeper, 164. *INNKEEPER*, I.
- II. Against party instituting proceeding, 71. *POOR*, XXVIII. 1.

PRINCIPAL AND ACCESSARY.

- I. Offence of entering, &c., land for the purpose of poaching, 493. *GAME*, I.
- II. Indictment.  
Against principal in second degree in misdemeanor, venue, 16. *INDICTMENT*, II. 1.

PRINCIPAL AND SURETY.

On affidavit of debt in bankruptcy.

Cancellation of surety bond on render of principal, 398. *BANKRUPT*, II.

PRISONER.

ARREST. DEPOSITIONS. FALSE IMPRISONMENT. HABEAS CORPUS.

PRIVILEGE.

From arrest, 881. *ARREST*, II. 1.

PROCESS.

Service: writ of summons.

If a writ of summons be directed to A. B. of S., in the county of Kent, "but to be heard of

at Peale's Coffee-house in the city of London," service of a copy of the process in London is bad, and will be set aside, though the latter part of the description be correct. *Simpson v. Ramsay*, 371.

PROHIBITION.

I. In suits for defamation.

1. Mixed imputations.

When a suit is instituted in the Spiritual Court for defamation, and the defamatory words are libelled as forming one article of charge, and the sentence appears, on the face of it, to have proceeded upon all the words complained of, a prohibition will go if part of the words contain imputations for which an action at common law would lie, though other parts contain matter which is properly of ecclesiastical cognisance.

If there be a rule that in cases of defamation the Spiritual Courts have concurrent jurisdiction with the temporal where a spiritual person is aggrieved, it applies only where the party is affected in his ecclesiastical character. Not, therefore, where a clergyman is defamed as having indecently assaulted a woman on the highway. *Evans v. Gwynne*, 844.

2. What is the distinction, if any, where a spiritual person is defamed, 844. *Antè*, 1.

II. Time of bringing.

1. Where not premature, 984. *CHURCH-RATE*, I.
2. After sentence, 844. *Antè*, I. 1.

PROMISE.

I. Unconditional.

Pending negotiation, 574. *BANKRUPT*, X. 1.

II. To revive debt after bankruptcy: signature, 574. *BANKRUPT*, X. 1.

PROMISSORY NOTE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTIONS.

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PROPERTY.

- I. Evidence under plea denying, 139. *TRESPASS*, II.
- II. Statement of in indictments, 49. *CONSPIRACY*, II. 1.

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- II. Costs of, 887. *HIGHWAY*, IV. 2.

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## SESSIONS.

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## I. Time of application.

Laches of objector, 94. Post, V.

## II. Form of rule nisi.

Objections how specified, 94. Post, V.

## III. Showing cause in first instance.

A burgess is not an "officer" within stat. 6 & 7 Vict. c. 89, s. 5, and therefore cannot be called upon to show cause in the first instance why a quo warranto information should not issue against him for exercising the franchise. *In re Milnes*, 589.

## IV. Nature of objection.

Invalidity of election to inferior office, 94. Post, V.

## V. Discretion of the court how exercised.

Where objection not brought promptly forward, and no practical benefit can arise from the proceeding.

On rule nisi for a quo warranto information for the office of mayor, it appeared that the defendant's eligibility to that office consisted in his being an alderman of the borough, and his election to the latter office was now impeached because the council had neglected, at the first election of aldermen, in 1835, to declare which aldermen should go out in 1838; that defendant was elected alderman in November, 1841, and mayor November, 1842; that by stat. 7 W. 4, and 1 Vict. c. 78, s. 23, no application could, when this rule was moved for, have been made to remove him from his office of alderman; and that, when the court gave judgment on this motion, there would barely have been time to obtain judgment of ouster before the year of the mayoralty would expire. The court, in the exercise of their discretion, discharged the rule.

The defendant was elected mayor 9th November, 1842, being then absent from the borough, to which he did not return till the 23d November. He had in the mean time casual information of his election, but did not receive any official notice of it until his return. Within five days after his return he made the requisite declaration, and took upon him the office. *Held*, a sufficient acceptance of the office within five days after notice, under stat. 5 & 6 W. 4, c. 76, s. 51.

The rule nisi specified the objections to defendant's title as alderman, but did not expressly show that his title as mayor was dependent on his title as alderman: this however appeared by affidavit. *Held*, sufficient within Reg. Gen. Hil. 7 & 8 G. 4. *Regina v. Preece*, 94.

## RAILWAY.

## I. Rights of company under clause entitling them to notice of action for any thing done in pursuance of act.

## Not for negligence as carriers.

The London and Brighton Railway Company, by their act, (7 W. 4, and 1 Vict. c. cxix.) were empowered to make the railway, which all persons were to have the liberty of using with carriages, &c., on payment to the company of tolls regulated by the act; the company were also empowered to provide locomotive engines on the railway and charge for the use of them, and to use locomotive engines and carriages for the conveyance of passengers, goods, &c., and to charge for such conveyance, in addition to the toll, within a limited amount. It was enacted that no action or proceeding should be prosecuted against any person or corporation for any thing done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice in writing.

Declaration in case against the company charged that they were owners of the railway, and of carriages used by them for the conveyance of passengers along it, for reward; that they being owners of the railway and carriages, plaintiff, at their request, became a passenger in one of the carriages, for reward to them, and they received him as such passenger; and it became their duty to use due care and skill in conveying him. Breach: that they did not use due care and skill in conveying him, but took so little care and so negligently and unskillfully conducted themselves in carrying him, and managing the carriage in which he was passenger, the train to which it was attached and the engine whereby it was drawn upon the company's railway, that the carriage was thrown off the rails and plaintiff injured.

*Held*, that no notice of action was necessary, the company being sued in their capacity of carriers, and not for any thing done or omitted under the special authority of the act. Although for the purpose of showing that the accident occurred from a speed which was improper under the circumstances, evidence was given that the rails were defective at the spot.

Per Lord Denman, C. J., at nisi prius. The plaintiff proved a *prima facie* case of negligence against defendants by showing that, when the accident occurred, the train and railway were exclusively under their management. *Carpue v. London and Brighton Railway Company*, 747

## II. Pleading and evidence.

*Prima facie* evidence of negligence as carriers, 747. *Ante*, I.

III. Railway company, when not liable for costs of supporting decision of sheriff, 365. *Mandamus*, V. 3.

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**RECEIPT.**

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**RECEIVER.**

Ancient accounts of, 773. **Post**, I. 1.

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- I. Payment of, essential to settlement, 907 **POOR**, XII. 2.
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- I. Pleading and evidence.
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- II. Right to begin.

Replevin. Cognisance for rent in arrear. Pleas in bar: 1. That defendants were not the bailiffs, &c. 2. Riens in arriere. 3. That the distress was not made within twenty years next after the time when the right to distrain first accrued to the person through whom title to the rent was made, and that such person discontinued receipt of the rent more than twenty years before the distress was made, and that no such rent was paid or received, or distrained or sued for, within twenty years next before the distress. Replication, that the distress was made within twenty years next after the time when the right to make a distress for the said rent first accrued. Issue thereon,

*Held*, that on the trial of this issue the plaintiff was entitled to begin, since it lay on him to show when the distress was made. *Collier v. Clarke*, 467.

**REPLICATION.**

De injuriâ, 247. **BILLS**, II. 3. 965. **BANKRUPT**, XI. 1.

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### SCIENTER.

- I. Essential to right of action for misrepresentation, 804. *MISREPRESENTATION*, I.
- II. Unnecessarily pleaded: when it must be proved, 447. *ATTORNEY*, I. 1.

### SCIRE FACIAS.

- I. When it may or may not issue.
  1. After alias fi. fa. not returned.

Plaintiff sued out a fi. fa., which was returned nulla bona, and afterwards an alias fi. fa., under which goods were seized. An injunction issued to restrain the sheriff from selling, on the ground that the goods seized were not the property of the defendant, and a master in chancery so reported; whereupon the sheriff withdrew from possession. Plaintiff then issued a ca. sa., on which defendant was taken, but discharged, on the ground that the alias fi. fa. had not been returned. Plaintiff then issued a scire facias on the judgment.

*Held* that, although it must be taken, after the discharge of the ca. sa. for the non-return of the alias fi. fa., that something had been done under the alias fi. fa., yet the scire facias ought not to be set aside for irregularity as having issued before the return of the alias fi. fa., inasmuch as the defendant, if any thing had been taken under the alias fi. fa.,

might plead the fact, whether that writ had been returned or not, and whether or not the plaintiff had been satisfied. *Holmes v. Newlands*, 367.

2. Where a fi. fa. had been executed within the year.

To a declaration in scire facias to revive a judgment, the defendant pleaded that, within a year after the judgment, plaintiff sued out a fi. fa. for the sum recovered, under which writ the sheriff entered and took possession of all the goods and effects in and upon the dwelling-house of defendant, situate, &c., and that the fi. fa. "was returned and filed on or about," &c., adding a verification, and concluding, "Wherefore, inasmuch," &c., (referring to the matter of the plea,) "the said defendant prays judgment of the said writ of scire facias and declaration thereon founded, and that the same may be quashed," &c. On special demurrer,

*Held* a bad plea, on the grounds,

1. That the mere fact of an execution having been issued during the year, is no answer to a scire facias brought after its expiration, though satisfaction of the demand under such execution would be an answer, in proportion to the amount recovered.

2. That the plea did not state whose goods were taken.

Judgment, that the plaintiff have execution. *Holmes v. Newlands*, 634.

### II. Pleading.

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2. Satisfaction by execution, 634. *Ante*, I. 2.
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Corporate, necessity of, 526. *TOLLS*, I.

### SECURITY.

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2. Cannot enter appeal at instance of respondents, 1. *POOR*, XXVI. 1.

**III. Order.**

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**SETTLEMENT.**

- I. On marriage. *MARRIAGE SETTLEMENT*.
- II. Of poor. *POOR*.

**SEWERS.**

**I. Proceedings in court of.**

Traverse: demurrer: amendment.

On presentment, in a Court of Sewers, that M. S. received benefit in respect of his lands from a certain drainage, M. S. appeared and put in a traverse to the presentment, defective in form, but, as he alleged, raising a substantial defence. The clerk to the commissioners demurred specially. M. S. was heard in support of his traverse; and the commissioners, on September 7th, 1841, decided against him. He thereupon (at the same court) prayed leave to amend, and tendered a fresh traverse; but the commissioners refused to receive it. A rate was then made, comprehending the land of M. S. He refused to pay, was summoned for non-payment, and showed cause: a view of the land was had; and, after a final hearing, the commissioners, on July 25th, 1842, distrained. M. S., on May 10th, 1843, moved for a certiorari to bring up the proceedings, on the grounds that the commissioners ought not to have decided as judges on a demurrer virtually put in by themselves, and that, even if this was rightly done, the amendment should have been allowed.

*Held*, that the application came too late: but,

*Quare*, per Lord Denman, C. J., whether the objections, if made in time, would not have been valid: and, *semble*, per Coleridge, J., that the Court of Sewers ought to have permitted the amendment. *Regina v. Tower Hamlets, Commissioners of Sewers*, 357.

- II. Time of objecting to improper proceedings, 357. *Antè*, I.

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1. For arresting a privileged person, and disobeying order for his discharge, 381. *ARREST*, II. 1.
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**II. Rights against attorneys.**

For misrepresentation as to identity of defendants, 804. *MISREPRESENTATION*, I.

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For directing him to execute writ against wrong person, 804. *MISREPRESENTATION*, I.

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- I. In body of documents, 574. *BANKRUPT*, X. 1.
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- III. When not essential to admissibility of ancient accounts, 773. *Post*, I. 1.
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- V. Of statement of grounds of appeal, 508. *POOR*, XXV. 1.
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- I. On justice of the peace, 955. *CRIMINAL INFORMATION*.
- II. Proceedings for in Ecclesiastical Court, 844. *PROHIBITION*, I. 1.
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- I. Granted at sessions: certiorari how obtained, 201. *CERTIORARI*, IV. 1.
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Page 624. *LIBEL*, I. 1.

**STAGE-COACH.**

Action on settlement of account between proprietors, 128. *PARTNER*, III. 1.

**STAMP.**

**I. On receipts.**

Defendant, in support of a plea that he had paid five quarters' rent to M., tendered in evidence the following paper, signed by M. "Mr. Jones" (defendant) "having written off the sum of 72/ from his mortgage-debt, being five quarters' rent of his house, I hereby discharge the same rent till the 24th day of July, 1841." M. had delivered the paper to defendant, being then indebted to him on a mortgage-debt exceeding 72/. The only stamp on the paper was a 1/ stamp, with no denomination on its face, and had been affixed more than one month after the signing and delivery of the paper.

*Held*: 1. That the instrument was a receipt under stat. 55 G. 3, c. 184. Schedule, Part I, Receipt.

2. That it was inadmissible, for want of a proper stamp, though a receipt stamp would have cost less than 1*l.*; sect. 10 of stat. 55 G. 3, c. 184, not protecting receipts which have not been stamped within a month after execution, under stat. 35 G. 3, c. 55, ss. 8, 10, 11. *Lucas v. Jones*, 949.

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- XLI. 5 & 6 W. 4, c. 76. (Municipal corporations.)**  
 1. Sect. 6. Appointment of jail chaplain, 147. **JAIL.**  
 2. Sect. 68. Discontinuance of offices, 526. **TOLLS, I.**  
 3. Sect. 66. Compensation for loss of office. An attorney cannot, under stat. 5 & 6 W. 4, s. 66, or stat. 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emoluments which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney. *Regina v. Manchester, Mayor, &c.*, 402.  
 4. Sects. 78, 92. Expenses chargeable on borough fund: fees of justices' clerk.  
 Under stat. 5 & 6 W. 4, c. 76, s. 82, the council of a borough cannot make an order that the treasurer shall pay costs of defending borough constables on a prosecution incurred by them in the discharge of their duty. Such order must be made by the watch committee, with the approbation of the council.  
 Such an order, by the council was quashed on certiorari, although the watch committee had, while the prosecution was depending, made a report to the council recommending that the constables should be exonerated, as far as was authorized by law, from all expenses necessarily incurred by them in the execution of their duty, which report the council adopted.  
 And although, before the certiorari was moved for, the treasurer had paid the costs in obedience to a direction in proper form given on behalf of the council. *Regina v. Thompson*, 477.  
 5. Sect. 92. What fees chargeable on borough fund.  
 Under stat. 5 & 6 W. 4, c. 76, s. 92, the fees of the clerk to justices of a borough, for business done in respect of persons apprehended by the police and brought before the justices, or in respect of informations and other proceedings taken by and at the instance of the police, must be paid out of the

- borough fund (if they cannot be obtained from the individuals who ought to pay them) as expenses "necessarily incurred in carrying into effect the provisions" of that act. And the court, in such case, will grant a mandamus to enforce payment.  
 On motion for such mandamus, it being suggested that a retrospective rate might be necessary, the court nevertheless made the rule absolute, leaving the defendants to allege that fact, if it existed, and discuss its effect, on a return. *Regina v. Gloucester, Mayor, &c.*, 862.
- XLII. 6 & 7 W. 4, c. 65. (Game.)**  
 Sect. 9. Charge on oath, 493. **GAME, I.**
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- XLIV. 7 W. 4, and 1 Vict. c. 78. (Municipal corporations.)**  
 Sect. 14. Voting paper at election of aldermen; place of abode.  
 On the election of an alderman for a borough, if the voting papers do not contain an accurate description of the place of abode of the party voted for, the votes are bad, under stat. 7 W. 4, & 1 Vict. c. 78, s. 14; though the inaccuracy be without fraud, and the description in the voting paper be commonly understood to be that of the party. *Regina v. Deighton*, 896.  
 2. Sect. 37. Grant of quarter sessions: jail chaplain, 147. **JAIL.**
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## TOLLS.

## I. Title to.

- When not affected by suspension of office.  
The proprietor of tolls wrongfully taken  
and withheld by a corporation aggregate may  
sue the corporation in assumpsit for money  
had and received.

The layer keeper of Swansea was an offi-  
cer employed to keep the layers or beds for  
shipping in the port free from obstacles, and  
in a proper state. He was appointed, by  
custom, at a leet and baron court held yearly  
in May and October, by the steward of the  
seignory of Gower, the lord of which (the  
Duke of Beaufort) was lord of the borough  
and manor of Swansea. These were coex-  
tensive. The jury of the court (composed  
of aldermen, burgesses and residents) pre-  
sented two persons to the steward; one of  
them he elected to be layer keeper. The  
portreeve (the head officer of the borough  
before stat. 5 & 6 W. 4, c. 76,) sat with the  
steward, but took no part in the proceedings.  
The layer keeper was sworn to execute the  
office for the year ensuing, and until another  
should be chosen in his stead, or he should  
be lawfully discharged. By act of parlia-  
ment, 31 G. 3, c. 93, to the introduction of  
which the duke and the corporation were  
parties, trustees were appointed for managing  
and improving the harbour; but the office  
and rights of the layer keeper were expressly  
reserved. Under the authority of this act a  
harbour master was appointed, who perform-  
ed all the actual duties formerly discharged  
by the layer keeper. Tolls, other than those  
received by the layer keeper, were paid by  
the shipping which used the port to the port-  
reeve, (who paid the corporation a rent for  
moorage, &c.,) and to the water bailiff, an  
officer of the duke.

Plaintiff had, for some years before the  
passing of stat. 5 & 6 W. 4, c. 76, been an-  
nually appointed layer keeper. In May,  
1836, he was reappointed, under protest from

the mayor of the then corporation. In October, 1838, the corporation prevented the holding of the court leet and court baron; and, in consequence, no court was held till May, 1842, when they were resumed. No appointment of layer keeper took place from May, 1836, till May, 1842, when plaintiff was reappointed. In October, 1836, the town council resolved that the appointment of layer keeper should be vested in the corporation, and the revenue added to the corporation fund. The corporation accordingly received the layer keeper's dues from January, 1837, to June, 1842. Plaintiff sued them for the amount in assumpsit for money had and received. *Held*,

1. That plaintiff had not ceased to be layer keeper by the omission to appoint from 1836 to 1842.

2. That the office had not been, and could not be, discontinued by the corporation under stat. 5 & 6 W. 4, c. 76, s. 58.

3. That the cessation or suspension of the layer keeper's services had not affected the right to receive the tolls.

4. That the action, in point of form, was well brought. *Hall v. Swansea, Mayor, &c.*, 526.

Q. How recovered from corporation aggregate, 526. *Antè*, I.

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I. Custom of, 303. *Poor*, XX. 4.

II. Libel in respect of, 624. *LIBEL*, I. 1.

#### TRAVERSE.

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1. When the proper remedy for malicious omission to discharge a prisoner, 381. *ARREST*, II. 1.

2. Against magistrate, 469. *ORDER*, V.

II. Pleading and evidence.

Plea denying property.

In trespass quare clausum fregit, if issue be joined on a plea that the close was not the property of the plaintiff in manner, &c., the plaintiff's case is established if he proves possession; and the defendant cannot, on such pleadings, offer evidence of title in himself. *Whittington v. Borall*, 139.

III. Costs.

Plaintiff recovering  $\frac{1}{2}d.$  under writ of inquiry after judgment on demurrer, not deprived of, 337. *COSTS*, II.

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III. Between documents described in certiorari and those returned, 912. *POOR*, XXI. 2.

#### VENDORS.

Goods and chattels.

I. Machinery: fitness for purpose.

Plaintiff was the patentee and manufacturer of a patent machine for printing in two colours. Defendant saw the machine on plaintiff's premises, and ordered one, plaintiff undertaking, by a written memorandum, to make him "a two-colour printing machine on my patent principle." In an action for the price, defendant excused himself from liability on the ground that the machine had been found useless for printing in two colours.

The judge, in summing up, told the jury that, if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that, if it was not a known, ascertained article, and defendant had merely ordered, and plaintiff agreed to supply, a machine for printing two colours, defendant was not liable unless the instrument was reasonably fit for the purpose.

*Held*, a proper direction; and the jury having found for the plaintiff under it, this court refused to disturb the verdict. *Ollivant v. Bayley*, 288.

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III. Question for the jury, 288. *Antè*, I.

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A warrant of attorney to confess judgment was attested by an attorney as follows: "Signed" "by the above-named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said G. C. P. before the execution thereof by him." Signed, "J. H. S., attorney, Leeds. J. R."

*Held*, an insufficient attestation under stat. 1 & 2 Vict. c. 110, s. 9, for want of a statement that J. H. S. subscribed as attorney for G. C. P. *Everard v. Poppleton*, 181.

**II. To secure annuity.**Effect of setting aside, as affecting the consideration, 432. **ANNUITY, II. 1.****WATCH COMMITTEE.**Page 477. **STATUTE, XLI. 4.****WILL.****I. Construction of devise. DEVISE.****II. Tenant at will, 757. LIMITATION, II.****WITNESS.****I. Who may be compelled to give evidence.**Not a party to the record: not rateable inhabitants of indicted township, 187. **EVIDENCE, IX. 1.****II. Re-examination.**As to opinion, where necessary to explain the answers given on cross-examination, 731. **LIBEL, I. 2.****III. On criminal charge.**Copies of depositions, 655. **DEPOSITIONS.****IV. On proceeding to summary conviction.**Must be shown to have been examined in presence of defendant, 933. **CONVICTION, I. 1.****V. Indictment for attempt to prevent witness from appearing at trial, 44. INDICTMENT, II. 5.****WORDS.****I. Criminal information for, 955. CRIMINAL INFORMATION.****II. See also DEFAMATION. LIBEL. SLANDER.****WRIT OF ERROR.****ERROR.****WRIT OF INQUIRY.**Trial under, 335. **COSTS, VIII.****WRIT OF SUMMONS.**Service, 371. **PROCESS.****WRITING.****I. Explanation by custom of trade, 303 POOR, XX. 4.****II. Oral explanation of, 653. POOR, XII. 2**















